Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976,

No. 76-1361

J. A. McCARTHY, INC., *Petitioner,*

v.

EDWARD BRADSHAW, *Respondent,*

DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, (75 BRB 209, A and B) *Party Respondent.*

INDEPENDENT PIER COMPANY, *Petitioner,*

v.

JOHN LIND, *Respondent,*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, (75 BRB 211) *Party Respondent.*

LAVINO SHIPPING COMPANY, *Petitioner,*

v.

JAMES W. PARKS, *Respondent,*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, (75 BRB 212) *Party Respondent.*

J. A. McCARTHY, INC., *Petitioner,*

v.

WILLIAM FAIRMAN, *Respondent,*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, (75 BRB 221) *Party Respondent.*

LAVINO SHIPPING COMPANY, *Petitioner,*

v

ROBERT MULDOWNEY, *Respondent,*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, (75 BRB 210) *Party Respondent.*

MAHER TERMINALS, INC., Employer and AMERICAN MUTUAL LIABILITY INSURANCE CO., Carrier, *Petitioners,*

v.

AUGUSTIN CABRERA, *Respondent,*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, (75 BRB 200) *Party Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

TABLE OF CITATIONS,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered in these cases on January 4, 1977.

OPINIONS BELOW.

These matters arise under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972. The decision and opinion of the Administrative Law Judge and the Benefits Review Board of the United States Department of Labor affirming the decisions and orders of the Administrative Law Judges appear at pages A1 to A82 in the Appendix to this Petition. The Judgment Order of the Court of Appeals for the Third Circuit appears in the Appendix to this petition at page A83.

JURISDICTION.

The Judgment of the Court of Appeals for the Third Circuit was entered on January 4, 1977 (A83). The jurisdiction of this Court is invoked under the provisions of 28 USC § 1254(1).

QUESTIONS PRESENTED.

1. Whether the 1972 Amendments to the Longshoremen's and Harbor Workers' Act were intended to extend workers' compensation benefits to those persons working on a pier or marine terminal who were not directly involved in the loading or unloading of a vessel.

2. Whether the status of each injured employee and the sites of the accident were sufficient to meet the requirements of the 1972 Amendments to the Longshoremen's and Harbor Workers' Act.

STATUTE INVOLVED.

The resolution of these issues involve an interpretation of the following sections of the Longshoremen's and Harbor Workers' Compensation Act.

Section 2(3), 86 Stat. 1251, 33 U. S. C. § 902(a):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U. S. C. § 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 1265, 33 U. S. C. § 903(a):

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

STATEMENT OF THE CASE.

Each of these matters involves an appeal on behalf of an employer from decisions by Administrative Law Judges, affirmed by the Benefits Review Board of the U. S. Department of Labor and the Court of Appeals for the Third Circuit holding that the employees were maritime employees, working for maritime employers, and that since the injuries occurred on navigable waters of the United States, the employees were covered under the provisions of the Longshoremen's and Harbor Workers' Act. Petitioners contend that the services rendered by each of the employees were supportive in nature and were not directly involved in the loading and unloading of a vessel. Therefore, the employees were not maritime employees within the provisions of the Longshoremen's and Harbor Workers' Act and that they should be left to their devices under the applicable State Workmen's Compensation Act.

On August 27, 1974, Edward Bradshaw, a member of the Mechanic's Lockermen, Gearmen, Crane Operators and Truck Drivers' Local 1291 of the International Longshoremen's Association, was employed as a mechanic by J. A. McCarthy, Inc. His employment generally involved the repair of fork lift truck and general maintenance of repair work of similar vehicles in a garage or maintenance shed on the terminal. His injury occurred when he was caused to slip while removing a tire from a fork lift truck. The fork lift was parked on the pier. It had been used aboard a vessel the previous night but was not in service at the time that his injury occurred.

On February 5, 1973, JOHN LIND was employed as a cargo checker by Independent Pier Company at Pier 2, Girard Point, Philadelphia, Pennsylvania. At that time, he was a member of Local 1242 of the International Long-

shoremen's Association, that Local being referred to the Philadelphia waterfront as the Clerks' and Checkers' Local. During the course of his employment, he was involved in an industrial accident that resulted in his being injured and incurring a period of disability for which he was paid benefits under the Workmen's Compensation Act of the State of Pennsylvania. At the time that he was injured, he was engaged in the keeping of tallies on bundles of pipe that were being loaded onto a flat bed trailer so that, they could be removed from Pier 2, Girard Point, Philadelphia to the Tioga Terminal in Philadelphia. The pipe had been delivered by truck to Girard Point on February 3, 1973, but it had not reached the pier in time to reload it aboard its intended vessel. The consignor of the pipe, therefore, arranged to have it removed from Pier 2 and delivered to Tioga Terminal for transshipment from that point. A fork lift truck that was being driven by a fellow employee of Independent Pier Company was being used in connection with the loading of the pipe aboard the bed of the trailer. During the course of this loading, a draft of pipe fell on John Lind causing his injury. At no time during the course of his employment on February 5, 1973 was he actively engaged in the loading and/or unloading of cargo on a vessel.

On May 15, 1973, JAMES W. PARKS was employed as a cargo checker by Lavino Shipping Company at Pier 82, South Wharves, Philadelphia, Pennsylvania. He was also a member of Local 1242 of the International Longshoremen's Association. During the course of his employment, he suffered an industrial accident that resulted in a disability for which he was paid benefits under the provisions of the Workmen's Compensation Act of the State of Pennsylvania. At the time that he was injured, he was checking bales of nylon fiber that were stored on pallets within Pier

82. These bales had been discharged from a vessel and placed in storage on the pier on May 5, 6 and 7, 1973. Parks duties as a checker required that he tally the bales as they were being taken from their place of storage and loaded on a truck for delivery to the consignee. While one of the pallet loads of cargo was being taken from the second tier of the bales by a fork lift truck owned and operated by an employee of Lavino Shipping Company, a bale was caused to fall from a pallet striking Parks on his leg and causing the injury that resulted in his disability.

On January 28, 1974, WILLIAM FAIRMAN was employed by J. A. McCarthy, Inc. at Tioga Marine Terminal, Philadelphia, Pennsylvania, in connection with a coopering operation. This operation required that he stitch torn bags of cocoa beans that were stored on the pier at the marine terminal. Prior to the date that he was stitching these bags, they had been discharged from a vessel by members of Local 1291 of the International Longshoremen's Association. At the time that Fairman was working on the bags, whole bags of beans were being taken from the place of rest on the pier and being loaded into railroad cars by employees in the terminal who were members of the International Longshoremen's Association Local 1332, that Local being identified as the Carloaders Local. Fairman was a member of International Longshoremen's Association Local 1566, that Local being identified as the Carpenters' Local. While he was stitching the bags of cocoa beans on the pier, one of the carloaders who was operating a fork lift truck drove into him and caused the injury from which his disability resulted.

On February 19, 1973, ROBERT J. MULDOWNEY, a member of International Longshoremen's Association Local 1242 was employed as a checker by Lavino Shipping Company at the Packer Avenue Marine Terminal, Phila-

delphia, Pennsylvania. On the date of the injury, he was required to drive an automobile owned by Lavino Shipping Company around the storage area of the terminal to locate containers that were stored thereon. He would note on his list the location of specific containers so that when a vessel docked at the pier a "yard horse" driver could locate it when he was directed to take the container from its place of rest or storage on the pier and deliver it to the river edge of the pier so that it could be loaded aboard a vessel. While he was driving the automobile around in the yard, it came into collision with another vehicle and his injuries resulted. The vessel upon which the containers that he was spotting were ultimately to be loaded was due to and did arrive at the terminal at 12:30 p.m., February 20, 1973, the day after his injury occurred.

On April 3, 1973, AUGUSTIN CABRERA suffered an industrial accident while in the employ of Maher Terminals, Inc., Port Elizabeth, New Jersey. On the day that he was injured, he was assigned to work as a terminal laborer in a warehouse identified as Building 4000. The initial claim form that he signed indicated that the accident occurred while he was loading a truck. He later stated that the work that he was performing took place in a "box" so that he could not tell whether it was a truck or a container. At the hearing before the Administrative Law Judge, he testified that he was taking cartons from inside a container and placing them on a pallet. The pallet would then be moved to a place of storage inside that same pier building (App. 174a 189a).

The terminal operated by Maher Terminals, Inc. covers approximately 150 acres at Port Elizabeth, New Jersey. Ships are berthed at the river edge of the wharf. With respect to container ships, the containers are unloaded from the ships by the use of shore-side overhead

cranes. These cranes lift a container from the vessel, carry it over the side and then land it on a chassis that is positioned on the pier, beside the vessel, under the crane. A "yard horse" then removes the container and chassis from the side of the ship and moves it to a marshalling area within the perimeter of the terminal where it is stowed pending either stripping of further transshipment as a unit. If the cargo that is stowed within the container is to be stripped or taken out of the container while it is at the terminal, the container is moved to the east side shed of Building 4000. Then the container is opened and terminal labor is used to strip the cargo from the interior of the container and move it to its place of storage inside the warehouse to await delivery to a consignee.

Adopting either contention, namely that of the employer that the plaintiff was working inside a truck or that of the plaintiff as testified to before the Administrative Law Judge that he was stripping a container, the activity was taking place with respect to cargo that was at a place of rest within the warehouse, subsequent to the time that the container was discharged from the vessel and placed at rest within the marshalling yard.

REASONS FOR GRANTING CERTIORARI.

The Court has presently before it Petitions for Writs of Certiorari to the United States Courts of Appeals for the First and Second Circuits in *John T. Clark & Son of Boston, Inc. and American Mutual Liability Insurance Co. v. John A. Stockman and Director, Office of Workers' Compensation Programs, United States Department of Labor* (U. S. No. 76-571); *Northeast Marine Terminal Company, Incorporated, and State Insurance Fund v. Ralph Caputo and Director, Office of Workers' Compensation Programs, United States Department of Labor* (U. S. No. 76-444); *International Terminal Operating Co., Inc. v. Carmelo Blundo and Director, Office of Workers' Compensation Programs, United States Department of Labor* (U. S. No. 76-454) and the Fifth Circuit in *William T. Adkins v. I. T. O. Corporation of Baltimore and Liberty Mutual Insurance Company* (U. S. No. 76-730).

In all but the *Adkins* case, employer-petitioners and their insurers seek to overturn Administrative Law Judges decisions, affirmed by the Benefits Review Board and various Courts of Appeals extending benefits under the Longshoremen's and Harbor Workers' Compensation Act to employees performing strictly terminal functions who were not directly involved in the loading or unloading of vessels.

In the matters represented by this appeal, petitioners are attempting to demonstrate, in a consolidated petition, the vast number of activities occurring on a marine terminal that vary from the duties engaged in by the employees in the pending matters before the Court as well as from the duties of longshoremen who are directly concerned with the loading and unloading of vessels.

It is possible that a decision reversing the Court of Appeals in *I. T. O. Co., Inc. v. Blundo* (U. S. 76-454) would not be dispositive of the issues created in the matters of *Lind* and *Park* who were checkers working on a pier at which cargo was delivered, but who were engaged in checking its being loaded on a truck for off delivery from the pier, not its discharge from a vessel. On the basis of present decisions by the Circuit Courts, their injuries are covered. However, if the driver of the truck was to truck it to a destination on land and not merely shuttling it in maritime commerce he would not be entitled to benefits under the Federal Act even if he was injured in the same manner as these checkers, under the holding in *Sea-Land v. Director, Office of Workers' Compensation Programs, United States Department of Labor*, 540 F. 2d 629.

None of the petitions presently before the Court deal with questions posed by the facts of the matter in the *Muldowney* matter where his duties consisted of driving an automobile on the terminal spotting and marking containers for movement sometime in the future, or *Fairman*, a cooper repairing stowed cargo at the time of his injury, although at times he would perform the same task on a vessel.

The decision in the Fourth Circuit in the *Adkins* matter is contrary to the decision reached by the Third Circuit in *Cabrera* on almost identical facts. In *Adkins*, a container had been discharged from a ship and stored in a marshalling area. The container was then moved to a shed where its contents were stripped and stored. Adkins was injured when he was moving the contents from the storage area to a truck for off pier delivery. On these facts, the Fourth Circuit Court held that Adkins was not entitled to coverage.

In *Cabrera*, a container had also been discharged from a vessel and stored in a marshalling area. The container

was then moved to a separate terminal building where its contents were removed and placed on a truck for off pier delivery. In this operation, the injury occurred. On those facts, the Third Circuit Court affirmed the decision of the Administrative Law Judge and the Benefits Review Board, finding in favor of the granting of benefits. A clear conflict and one that should be considered by the Court.

On the facts in *Bradshaw,* it would appear that the Third Circuit Court has erred in that it misapplied its own standard as outlined in *Sea-Land Service v. Director, Office of Workers' Compensation Programs, United States Department of Labor,* 540 F. 2d 629. As stated above, Bradshaw was a mechanic and repaired and maintained mechanical equipment that was used throughout the terminal. At the time of his injury, the piece of machinery on which he was working was out of service. It was not being used in connection with any movement of cargo within the terminal complex.

In *Sea-Land,*[1] the Third Circuit Court stated that the line that delimited the outer reaches of the Act's coverage was a functional and not a spatial one. It went on to say that in its opinion the overall intention of the Congress in amending the Act was to afford coverage to all those employees engaged in the handling of cargo after it had been delivered from one mode of transportation for the purpose of loading it aboard a vessel, and to all those employees engaged in discharging the cargo from a vessel up to the time it has been delivered to a place where the next mode of transportation will pick it up. It appears that the Court is emphasizing the fact that the handling of the cargo is the touchstone for coverage. Under that holding, Brawshaw should not have been affirmed.

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1. Sea-Land, *supra* at pgs. 636 an d639.

Therefore, Petitioners respectfully submit that a Writ of Certiorari issue to the Third Circuit Court below so that the ramification of the many facets of employment on a marine terminal contrasted to the strictly loading and unloading functions of stevedores and their longshoremen employees can be argued on the merits.

CONCLUSION.

Petitioners, for all of the reasons set forth in this Petition, respectfully urge the Court to grant Certiorari and to reverse the decision of the Court below.

Respectfully submitted,

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Appendix.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, D.C. 20210

CASE No. 75-LHCA-408
OWCP No. 3-7003

IN THE MATTER OF
EDWARD BRADSHAW
Claimant

v.

J. A. McCARTHY, INC.
Self-Insured
Employer

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BEFORE: DAVID W. PELKEY
Administrative Law Judge

DECISION AND ORDER.

Claimant seeks compensation for temporary total disability from August 27, 1974, through February 2, 1975, and paying of costs of examinations by two physicians, all resulting from an August 27, 1974 injury, under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. 901 *et seq.*, (the Act). This Decision and Order follows a May 22, 1975, hearing that was conducted in accordance with 5 U. S. C. 554. At that hearing, the parties represented that they are reached agreements as to the issues to be adjudicated and as to the facts to be taken as admitted. The agreements, framed as stipulations, follow:

Stipulation of Issues to Be Adjudicated

Whether an injury suffered by a mechanic, who performed maintenance and repair work on forklifts used by Employer to unload ships and to load freight cars and other land vehicles, in a building on Employer's terminal facility, while removing a tire from a forklift, is within the coverage of the Act.

Whether Claimant suffered temporary disability from October 22, 1974, through February 2, 1975.

Whether Employer is liable for fees for services rendered Claimant, by two physicians, without Claimant's having asked Employer to authorize the rendition of services by those physicians.

Stipulation of Facts to Be Taken as Admitted

Claimant sustained an accidental injury on August 27, 1974, while in the course of employment by Employer.

On the date of the injury, Claimant's average weekly wages was $346.00.

Claimant was temporarily totally disabled from August 27, 1974 through October 21, 1974.

The doctors' statements made a part of the record are authentic, fair and reasonable.

Statement of the Case

Claimant testified that he was a general maintenance and repair mechanic who worked on forklifts owned and used by Employer to unload ships and to load freight cars, tractors and trailers. He said that he performed his work on board ships, on the dock along the waterfront and in a maintenance shop. He indicated that he also worked on tractors Employer used to move containers on a pier and between piers. He represented that his work required the handling of heavy objects along with stooping, standing, bending, and other physical movement. The witness stated that he had been a member of the maintenance department of the longshoremen's union for 18 years, that he worked for Employer approximately 2½ years and that he was one of six or seven mechanics Employer hired. In April 1975, he was transferred to another company as a trailer repairman.

Claimant said that on August 27, 1974, between 8:30 and 9:00 a.m., he was in an A-frame-type building at Tioga Terminal. (Prior to that time, he had spotted forklifts that were to be used during the day in loading/unloading activities.) When removing a 4½-foot by one foot tire from a forklift to bake repairs, he slipped, fell backward and struck his head. Employer personnel took him to a hospital where he was X-rayed and told to return the following day. He returned, remained the better part of the day and went home without examination or treatment. He was called to the hospital for a third day, at which time he discussed his condition with a staff physician. Thereafter he did not return to the hospital.

Employer sent him to a second doctor on September 3, 1974, and he was given a back brace. The witness also saw and was treated by that doctor on October 2, 7, and 14, 1974. At the time of the last visit, the doctor discharged him and told him he could "try to" return to work on October 21. Reportedly because he was still experiencing pain and could not sleep, he did not report to work on the designated date. He did not return to the second doctor because he was not satisfied with the treatment.

On November 14, 1974, Claimant saw a third doctor who suggested that he get as much rest as possible until he was relieved of pain. On February 3, 1975, the witness testified, he decided to see whether he could work. He returned to work because he "thought it was time to go back". Although he did not feel too good, he was able to work because he sought "light" work. The witness reported that, as of the hearing date, he experienced pain in the back if he leaned over, swam, fished, or cut grass.

On cross-examination, Claimant said that termination of his association with Employer was unrelated to his injury. He stated that 75-80% of the work he performed for Employer was done in a maintenance shop, about ¼ mile from the pier, at the entrance to the terminal. He worked in the shop when he, a water boy and a "gear" man were not on stand-by duty at the vessel. The stand-by duty was designed to accomplish emergency repairs to forklifts during the period that they were being used to remove cargo from a vessel.

He stated that, at the time of his injury, there was no vessel at the pier. The forklift he was working on when he was injured had developed a need for mechanical repairs the previous night while removing cargo.

The witness said that he did not see the staff doctor until his third visit to the hospital and that the doctor then

wanted to hospitalize him. He rejected the recommendation because he had committed himself to a trip to Europe. He noted that, whereas the second doctor also thought the trip unwise, Claimant was in Europe between September 5 and 26, 1974, "because I had nothing to do. I couldn't get the money back. I went with restrictions." The witness represented that he missed no medical appointments while on vacation.

Claimant said that, although the third doctor told him to seek "light" work, he did not relay that information to Employer. Rather, he sought such work on his own initiative. Too, he stated that he may have visited the third doctor a few days after the first visits, but since then (November 1974) he has seen no doctor in connection with back difficulties.

Although Claimant tendered no other witness to support his position, he did submit documentation in support thereof.

The August 27, 1974, report of the hospital to which Claimant was taken after the injury reflects a diagnosis of acute back sprain and a spinal fracture that was revealed by X-ray. It does not suggest a causal relationship between the fracture and the injury. The report indicates that the patient was told to rest and to return on the following day.

September 3, October 2, 7 and 14, 1974 reports of the second physician were made parts of the record. Generally, they reflect Claimant's complaints of back and back-related pain; his expressed inability to return to work; prescription of back brace and treatment to relieve pain; attempt to discourage the trip to Europe; prior treatment for a 1973 back injury; discharge from treatment on October 14; advice that Claimant "try to return to work on October 21, 1974," and return for examination on October 22; and the opinion that, because of the fracture and Claimant's

age (58 years), he would not be able "to perform full duties" until approximately November 26, 1974. In an October 22 letter to Employer, the doctor reported that Claimant had not kept that day's appointment. No documentation established a causal connection between the injury and the fracture.

A November 25, 1974, report of the third doctor, based on his November 14 examination, was made part of the record. It reflected the medical opinion that Claimant experienced residuals of back sprain causally related to the injury but expressed no opinion on a relationship between the fracture and the injury.

Finally, Claimant submitted documentation indicating that the third doctor's $75 fee for examination and the $50 fee of a fourth doctor, who X-rayed Claimant at the third doctor's request, had been paid.

Discussion

On brief, Claimant addressed the jurisdictional matter in three areas. The principal proposal was that, at the time of the injury, Claimant was engaged in longshoring operations. Decisions of the Benefits Review Board, submitted as representative of the Board's broad interpretation of loading and unloading processes, were designed to support the position. Secondly, Claimant submitted that, assuming that no longshoring operation attended his activity, he was engaged in harbor work, an activity covered by the Act. Thirdly, Claimant adopted the position that the location where the injury occurred is one that is included in the statutory definition of navigable waters of the United States.

Claimant's brief also argued that compensation should be allowed for the disputed period from October 22, 1974, through February 2, 1975, adopting the posture that the

record reveals that Claimant was disabled during the period and that Employer did not show that appropriate work was available to Claimant during the period.

Finally, Claimant argues that, in view of the proposal that the physicians' reports be substituted for their appearances and testimony, allowance of their fees is permissible under 33 U. S. C. 928(d).

Solicitor, Department of Labor, filed a memorandum addressed to jurisdiction, only. It was consistent with and supportive of the jurisdictional posture adopted by Claimant.

On brief, Employer treated the jurisdictional issue as it had treated the matter in *William Fairman v. J. A. McCarthy, Inc.*, 75-LHCA-412. Accordingly, the treatment of jurisdiction, as expressed in the Decision and Order in the *Fairman* matter, is appropriate for inclusion herein.

Employer submitted that Claimant was neither loading/unloading a vessel nor directly engaged in an activity in support o fsuch loading/unloading at the time of his injury; therefore, his injury is not within the coverage of the Act. Assuming the accuracy thereof, the submission is not supported by jurdicial determination or the legislative history of the 1972 amendments of the Act.

In *Beasley v. O'Hearne, et al.*, D. C., S. D., W. Va., 250 F. Supp. 49, Feb. 8, 1966, the court held that it is sufficient for coverage under the Act if an employee's duties only in part involve maritime employment. Such was not a determination that an employee had to be engaged in activity that constituted maritime employment at the time of injury. It was a determination that, at the time of an injury, an employee's duties had to include, if only in part, activity that constituted maritime employment.

The position taken by the Committee on Education and Labor, United States House of Representatives, in

House Report No. 92-1441, September 25, 1972, constituting legislative history attending the 1972 amendments, is consistent with the position adopted by the referenced court. The discussion of the proposed extension of the Act's coverage to shoreside areas includes the following statements (italics supplied):

> "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for *part of their activity.* ° ° ° The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activities. Thus, employees whose responsibility is *only* to pick up cargo for further transship would not be covered, ° ° °. Likewise, the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person *at least some of whose employees are engaged, in whole or in part* in some form of maritime employment. Thus, an individual employed by a persons *none of whose employees work, in whole or in part,* on navigable waters, is not covered ° ° °."

The foregoing leads to adoption of the proposition that a determination as to whether, at the time of the injury, Claimant was engaged in loading/unloading activities or whether he was directly engaged in an activity in support of loading/unloading is not controlling in the resolution of the jurisdictional issue. In the instant matter, the controlling consideration involves the determination as to whether Claimant's duties, under his employment contract, regularly and routinely included activities

that are included in the broad concept of maritime employment.

Uncompromised testimony established that Claimant regularly and routinely performed stand-by duties for and performed maintenance and repair work on forklifts while they were on vessels in connection with actual unloading operations. The record reveals that the machine on which Claimant was working at the time of injury had come to be in need of repair while engaged in such operations during the preceding night. No violence is done to the position adopted by Employer by determining that such activity is directly involved in vessel unloading. More importantly, however, such duty is maritime in nature, serves a maritime purpose and constitutes a duty covered by the concept of maritime employment.

Notably, the parties agree that Claimant sustained the injury, that he was doing what he should have been doing at the proper time and place at the time of the injury, and that the injury resulted in a disability.

All of the foregoing supports the determination that, for the purpose of resolution of the instant claim. Employer, Claimant, the injury, and the disability are covered by the provisions of and are to be treated under the Act.

The disability issue involves only the period from October 22, 1974, through February 2, 1975; the parties agree that Claimant was temporarily and totally disabled from the date of the injury through October 21, 1974.

Whereas the October 14, 1974, report of the second physician reflected advice that Claimant "try" to return to work on October 21, 1974, it also indicated that the doctor wanted Claimant to return to the office on October 22, expressed the opinion that Claimant would be unable to "perform full duties" until approximately November 26,

1974, and reported the patient's subjective opinion that, because of back pain, he did not then feel that he was physically capable of returning to work. None of the foregoing is considered to constitute substantial probative evidence that, as a matter of fact, Claimant was physically capable of performing his normal employment duties on October 22. Rather, it supports the inference that, on October 14, the doctor had no objective basis for concluding that such could be done; it supports the inference that he then believed that Claimant still experienced a disability.

Claimant testified that, because of the pain he was experiencing and the physical demands of his job, he felt that he was not "fit" to return to work on the date suggested by the doctor. That his position was justified is evidenced by the fact that he visited a third doctor 3½ weeks after it was suggested that he try to return to work. Further justification is reflected in that physician's November 25, 1974, observation that Claimant's "ability to return to work" then remained "somewhat guarded." Accordingly, it is determined that Claimant was physically unable to resume his occupational obligations from October 22, 1974 through November 25, 1974.

The foregoing results in the need to consider the period between November 26, 1974, and February 2, 1974. The record contains no medical evidence bearing on the matter of the date that temporary total disability terminated. Claimant's testimony that, although he did not feel "too good," he believed that he should try to, and did, return to work on February 3, 1975, was given in a manner that was convincing and is considered as having been persuasive. Employer tended no evidence that it contacted Claimant relative to return to work or that it made an effort to ascertain his physical condition after the last

visit to the second physician or after that physician's October 22, 1974, request that Employer contact Claimant relative to a desire for follow-up care. In that connection, Claimant's attitude relative to follow-up care by the physician is reflected in his testimony that he, not only was not satisfied with the treatment given by the physician, was under the impression that he had been discharged from the doctor's care on October 14, 1974. None of the testimony given by Claimant was effectively compromised. A careful evaluation of the entire record is deemed to be supportive of the determination that Claimant, was unable to return to work until February 3, 1975.

The issue relative to reimbursement of costs attending services by the third and fourth physicians is determined favorably to Employer. 33 U. S. C. 907(b) gives an employee a limited right to choose an attending physician. However, 33 U. S. C. 907(d), as found to be applicable herein, provides that an employee cannot recover amounts spent for medical services unless he has requested the employer to furnish the services, or he has requested the employer to authorize the rendition of services by the physician of his choice, and the employer has refused or neglected to do so. The record contains no evidence that Claimant requested Employer to furnish any medical service or supply that Employer refused or neglected to furnish. The record contains no evidence that Claimant requested Employer to authorize the rendition of service, by the third or fourth physician, and that Employer refused or neglected to authorize such.

Additionally, Claimant's proposal that the costs be allowed as witness fees under 33 U. S. C. 928(d) is not accepted. The record is void of evidence that the reports were intended as substitutes for testimony. At the hearing, Claimant's counsel specifically said that "reimbursement

for certain expenses paid" was sought; he made no mention of testimony by any physician. Further, when entitlement to reimbursement was alleged, Employer's counsel objected to any such allowance.

Accordingly, the record does not support a determination that Claimant is entitled to reimbursement of amounts paid the two physicians for services rendered in connection with the injury.

Claimant's counsel submitted a petition requesting an award of a fee for services rendered herein. He represented that a copy thereof, along with a copy of his brief, was forwarded to Employer's counsel. To date, no comments have been received from Employer relative to the request. Accordingly, it is determined that Employer does not object to an allowance of the requested fee. As detailed in the petition, the services and charges therefor are found to be reasonable. Award of a fee for services totalling 20¾ hours, at counsel's stated hourly rate, is deemed to be justified and is hereby approved.

Claimant's counsel has also requested an allowance of the cost of the transcript of the hearing. He has represented neither that the transcript was reasonably required nor that there is statutory support for charging such an allowance to the account of Employer. Accordingly, the request is denied.

Findings of Fact

1) On August 27, 1974:

A) Claimant, was employed by Employer as a mechanic, to perform maintenance and repair work on forklifts used to transfer cargo between vessels and Employer's pier facility at Tioga Terminal, Philadelphia, Pa.

B) Employer was engaged in the business of performance of stevedore contracts, and had employees engaged in that business, at the referenced terminal, a facility that adjoins waters used by vessels in international commerce.

C) While performing assigned duties at the time and location designated for such performance (which location was within the facility heretofore identified), Claimant suffered an accidental injury, as follows: while removing a tire from a forklift, he slipped, fell backward and struck his back and head on some unidentified objects.

D) On the basis of previous earnings in the employment in which he was then working, Claimant's average weekly wages was $346.

2) As a result of the August 27, 1974, injury Claimant was unable to work from August 28, 1974 through February 2, 1975.

Conclusions of Law

1) On August 27, 1974:

A) Claimant was a person engaged in maritime employment.

B) Employer had employees who were engaged in maritime employment upon the navigable waters of the United States.

C) Claimant suffered an accidental injury that arose out of and in the course of his employment, which injury occurred upon the navigable waters of the United States.

2) Because of the injury, Claimant suffered an incapacity to earn the wages that he was receiving, at the time of the injury, in the same or any other employment.

3) As a consequence of the incapacity suffered by Claimant, Employer is obligated to pay Claimant compensation for temporary total disability from August 28, 1974 through February 2, 1975, at the weekly rate of $210.54.

4) As a consequence of the injury, Employer is not obligated to reimburse Claimant $125 expended for services rendered by Doctors Jacob Krause and Irving B. Wexlar.

DECISION

The August 27, 1974, injury suffered by Claimant while performing repairs on a forklift used by Employer to unload ships and to load freight cars and other land vehicles, in a building on Employer's terminal facility, is within the coverage of the Act.

As a result of the injury, Claimant suffered temporary total disability from August 28, 1974 through February 2, 1975.

Employer is not liable for fees for services rendered Claimant by two physician's without Claimant's having asked Employer to authorize the rendition of services by those physicians.

ORDER

That Employer pay Claimant, as and for temporary total disability from August 28, 1974 through February 2, 1975, compensation at the weekly rate of $210.54.

That, as to any installment of compensation that was required to be but was not paid within 14 days after it became due, Employer pay Claimant an additional amount equal to 10 percentum of any such installment.

That, as to any installment not paid when due, Employer pay Claimant interest at an annual rate of 6 percentum until date of payment.

That, Employer deduct, from amounts due and payable under the Decision and Order, any amounts paid to Claimant, for the injury, under the Pennsylvania Workmen's Compensation Act.

That Employer pay Richard A. Weisbord, Esq., $1,556.25 for services rendered Claimant herein.

DAVID W. PELKEY
David W. Pelkey
Administrative Law Judge

Dated: August 5, 1975
Washington, D. C.

U. S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D. C. 20210

—

BRB Nos. 75-209
75-209A
and 75-209B

—

EDWARD BRADSHAW
Claimant-Respondent
Cross-Petitioner

v.

J. A. McCARTHY, INC.
Employer-Petitioner
Cross-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Petitioner

v.

J. A. McCARTHY, INC.
Employer-Respondent

DECISION.

Appeal from the Decision and Order of David W. Pelkey, Administrative Law Judge, United States Department of Labor.

Richard Weisbord (Freedman, Borowsky & Lorry), Philadelphia, Pennsylvania, for the claimant.

Thomas J. Ingersoll (Deasey, Scanlan & Bender), Philadelphia, Pennsylvania, for the employer.

Mary Sheehan (Wiliam J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D. C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members

Washington, Chairperson:

These appeals are by the claimant, the employer and carrier (hereinafter referred to as the employer), and the Director, Office of Workers' Compensation Programs, from a Decision and Order (75-LHCA-408) of Administrative Law Judge David W. Pelkey dated August 15, 1975. The claim was filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.* (hereinafter referred to as the Act).

On August 27, 1974, claimant injured his back while removing a tire from a forklift which he was repairing in the course of his employment as a mechanic with the employer. The accident occurred at the Tioga Terminal in Philadelphia, Pennsylvania. As a general maintenance and repair mechanic, claimant worked on forklifts owned by the employer and used to unload ships and to load freight cars, tractors, and trailers. He performed his duties on board ship, on the dock, and in a maintenance shop.

It was stipulated by the parties that claimant was temporarily totally disabled from August 27, 1974 through October 21, 1974; that claimant's average weekly wage was $346 at the time of injury; and that the doctors' statements made a part of the record were authentic, fair and reasonable.

The administrative law judge determined that claimant's injury was within the protection of the Act and that claimant was temporarily totally disabled from August 28, 1974 through February 2, 1975. Compensation was awarded accordingly, as well as interest, penalty, and attorney's fee. However, reimbursement was denied claimant for the unauthorized services of two physicians and for the cost of the transcript of the hearing.

The employer disputes the finding of the administrative law judge that claimant's injury was within the jurisdiction of the Act and that claimant was disabled from October 22, 1974 through February 2, 1975. The claimant contends that it was error to deny reimbursement in the amount of $125 for the services rendered by Dr. Jacob Krause and Dr. Irving B. Wexlar. Finally, the Director contests the determination of the administrative law judge that claimant may not recover the expense of obtaining a copy of the transcript of the formal hearing.

In the analogous case of *Vinciquerra v. Transocean Gateway Corp.*, 1 BRBS 523, BRB No. 75-125 (June 10, 1975), we held that a waterfront mechanic who sustained an injury within the terminal area while repairing machinery used in the loading and unloading of vessels was within the protection of the Act. The reasoning of that decision is equally applicable here. Merely because a waterfront mechanic is not directly involved in the actual loading or unloading of cargo does not remove him from the coverage of the amended Act. The maintenance and repair of longshoring machinery and equipment is essential to the movement of maritime cargo and, thus, such an employee's duties are included in the broad concept of maritime employment. 33 U. S. C. § 902(3). As the administrative law judge correctly stated:

> Uncompromised testimony established that claimant regularly and routinely performed stand-by duties for and performed maintenance and repair work on forklifts while they were on vessels in connection with actual unloading operations. . . . [S]uch duty is maritime in nature, serves a maritime purpose and constitutes a duty covered by the concept of maritime employment.

Decision and Order at 8.

The Board is well aware of the restrictive interpretation given the status requirement by the Fourth Circuit Court of Appeals in the recent case of *I. T. O. Corporation of Baltimore v. Adkins*, Nos. 75-1051, 75-1075, 75-1088, 75-1196 (4th Cir. Dec. 22, 1975). However, we are of the opinion that our interpretation with regard to coverage is more in keeping with the amended statute and the legislative history, and we will continue to follow the line of reasoning developed in previous decisions and reiterated in this case. *See Avvento v. Hellenic Lines, Ltd.*, 1 BRBS 174, BRB No. 74-153 (Nov. 12, 1974); *Coppolino v. International Terminal Operating Co.*, 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974); *Kelley v. Handcor, Inc.*, 1 BRBS 319, BRB No. 74-165 (Feb. 28, 1975); *Herron, Jr. v. Brady-Hamilton Stevedoring Co.*, 1 BRBS 273, BRB No. 74-171 (Jan. 23, 1975); *Purdue v. Jacksonville Shipyards, Inc.*, 1 BRBS 297, BRB No. 74-200 (Jan. 31, 1975); *Mildenberger v. Cargill, Inc.*, 2 BRBS 51, BRB No. 74-224 (July 3, 1975).

Further, there can be no doubt that the situs of claimant's injury satisfies the amended Act's expanded definition of "navigable waters" since he was injured within the employer's terminal in an adjoining area directly related to longshoring operations. 33 U. S. C. § 903(a); *Vinciquerra, supra; Mininni v. Pittston Stevedoring Corp.*, 1 BRBS 428, BRB No. 74-195 (May 1, 1975).

The employer also argues that there is not substantial evidence in the record to support the administrative law

judge's finding that the claimant was temporarily totally disabled from October 22, 1974 through February 2, 1975. The parties agree that claimant was temporarily totally disabled from the date of the injury through October 21, 1974. In his report dated October 14, 1974, Dr. Stephan Christides recognized claimant's persistent back pain but suggested that claimant "try" to return to work on October 21. Claimant did not do so, testifying that he was in constant pain and unable to do his job. He was then examined by Dr. Jacob Krause and, in his report dated November 25, 1974, Dr. Krause noted that claimant had residuals of musculo-ligamentous sprains within the lower back; that claimant continued to wear a back brace; and that his ability to return to work "must remain somewhat guarded".

Claimant testified that it wasn't until February 3, 1975 that he felt well enough to attempt to resume his duties as a mechanic. The determination of the credibility of a claimant is exclusively within the province of the trier of fact. *Plaquemines Equipment and Machine Co. v. Neuman,* 460 F. 2d 1241 (5th Cir. 1972). Here, claimant testified that he was in persistent pain and that he was unable to work. The administrative law judge found that none of claimant's testimony was effectively compromised. Further, recognition of claimant's continuing problem appears in the medical reports of both Dr. Christides and Dr. Krause. We therefore agree with the conclusion of the administrative law judge that "a careful evaluation of the entire record is deemed to be supportive of the determination that claimant was unable to return to work until February 3, 1975". (Decision and Order at 10).

The claimant contends that the administrative law judge erred in denying reimbursement, pursuant to Section 28(d) of the Act, 33 U. S. C. § 928(d), in the amount of $125 for the medical report and x-ray examination rendered by Dr. Krause and Dr. Irving B. Wexlar. Claimant argues that it was stipulated by the parties that the reports and bills of Dr. Krause and Dr. Wexlar were offered into evidence in lieu of their testimony. Even in light of such a stipulation, Section 28(d) is inapplicable. The purpose of Section 28(d) is to allow reasonable and necessary costs of witnesses attending the hearing at the instance of the claimant to be assessed against the employer. Here, Dr. Krause and Dr. Wexlar were not deposed or summoned as witnesses before the administrative law judge. Therefore, claimant's only recourse for reimbursement for the medical examinations and services rendered him by the doctors in question was Section 7 of the Act.

Finally, the Director appeals contending that the claimant may recover as "costs" the expense of obtaining a copy of the transcript of the formal hearing pursuant to Section 28(d). The administrative law judge denied claimant's requested allowance of the cost of the transcript of the hearing on the grounds that there was no showing that the transcript was reasonably required and that there was no statutory support for the charging of such an allowance to the employer.

As stated earlier, Section 28(d) of the Act only pertains to the reasonable and necessary costs of *witnesses* and not to the recovery of costs in general. *See* S. Rep. No. 92-1125, 92d Cong., 2d Sess., p. 23 (1972).

However, we do agree with the Director's contention that, in keeping with the humanitarian intent and spirit of the 1972 Amendments to the Act, reasonable and necessary miscellaneous costs may be awarded a claimant. Costs are allowances to a party for the expenses incurred in prosecuting or defending a suit. 20 C. J. S. Costs § 1. In amending Section 28 of the Act, we are of the opinion that Congress intended to place the financial burden of the

litigation upon the employer in certain instances where claimant has been successful. 33 U. S. C. § 928(a) and (b). Therefore, to insure that the successful claimant receives the compensation due him under the Act undiminished by litigation expenses, we hold that in those cases where an attorney's fee is awarded, reasonable and necessary costs and expenses incurred during the course of a proceeding by a claimant may also be assessed against the employer. Upon review of the record in the case before us, we are satisfied that the transcript of the proceeding was necessary for the proper preparation of claimant's post-hearing brief and that the $19 charge for the transcript was reasonable.

Accordingly, the Decision of the administrative law judge is modified to reflect the assessment of the cost of the transcript against the employer. In all other respects, the Decision and Order appealed from is affirmed.

RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

We concur:

RALPH M. HARTMAN
Ralph M. Hartman, Member

JULIUS MILLER
Julius Miller, Member

Dated this 26th day
of January, 1976.

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D. C. 20210

—

Case No. 74-LHCA-29
OWCP No. 3-5501

—

IN THE MATTER OF

JOHN LIND
Claimant

v.

INDEPENDENT PIER COMPANY
Self-Insured Employer

Leonard Spear, Esquire
Merange, Katz, Spear & Wilderman
Twelfth Floor—Lewis Tower Building
15th & Locusts Streets
Philadelphia, Pennsylvania 19102
For the Claimant

Thomas J. Ingersoll, Esquire
Deasey, Scanlan & Bender, LTD.
Suite 2900
Two Girard Plaza
Philadelphia, Pennsylvania 19102
For the Employer

Before: EDWIN S. BERNSTEIN
Administrative Law Judge

DECISION AND ORDER.

This matter presents a question of law relating to jurisdiction pursuant to Section 2(2) of the Longshoremen's

and Harbor Workers' Compensation Act, 33 U. S. C. 901 *et seq.*

FINDINGS OF FACT

The parties stipulated and I find the following facts:

1. On February 5, 1973, Claimant John Lind was injured in the course of his employment as a cargo checker for Independent Pier Company ("the Employer"). As a checker, Claimant was a member of Local 1242 of the International Longshoremen's Association. (AFL-CIO).[1]

2. Claimant's specific duties on February 5, 1973 consisted of keeping tallies of bundles of pipe that were being loaded onto a flat bed trailer so that they could be removed from Pier 2, Girard Point, Philadelphia, Pennsylvania to Tioga Terminal. A fork lift truck driven by another em-

1. Under the terms of a collective bargaining agreement between members of the Philadelphia Marine Trade Association and Locals 1242 and 1883 of the International Longshoremen's Association (AFL-CIO) clerks and checkers (also referred to as tallymen) have exclusive jurisdiction over the performance of the following work:

(1) All clerking and checking at marine piers and marine terminals where required.

(2) The clerking and checking involved in the receiving and delivering of all freight from vessel to pier or marine terminal and from pier or marine terminal to vessel.

(3) The clerking and checking where required in the receiving and delivering of all cargoes to and from trucks and/or other conveyances including railroad cars or lighters at piers or marine terminals.

(4) The placing of rail cars on piers and marine terminals.

(5) The clerking and checking of vans, containers, and pallets, etc. When the foregoing are shipped by one shipper or received by one consignee, they shall be received or delivered intact. When a van or container is shipped by more than one consignee, they shall be loaded or stripped on the pier or marine terminal.

Clerks and checkers shall have the work of checking and making records of containers received or delivered at piers in the Port of Philadelphia.

ployee of Independent Pier Company was being used to carry the pipes from the storage space on the pier and lift them onto the bed of the trailer. The pipe had been delivered to Girard Point on February 3, 1973, but had not been delivered in time to be loaded aboard its intended vessel. The consignor of the pipe had arranged to have it delivered to Tioga Terminal for shipment from there.

3. Claimant's average weekly wages at the time of his accident was $309.00. Claimant was temporarily, totally disabled for 40 weeks from February 6, 1973 to November 12, 1973, for which the Employer paid to Claimant compensation at the rate of $100.00 per week in accordance with the Pennsylvania Workmen's Compensation Act.

The parties submitted into evidence a joint medical report of Dr. Arnold H. Levine and Dr. Irving B. Wexler dated March 12, 1975, and a report of Dr. J. David Hoffman dated March 20, 1975. These doctors examined Claimant at the request of both parties. The first report dealt with x-rays and revealed healed crush fractures in the regions of the second, third and fourth metatarsophalangeal joints, with deformity of the corresponding subarticular surfaces, of the right foot. Dr. Hoffman reported that as of March 20, 1975, Claimant had reached optimum recovery from the "substantial crushing trauma" that he had sustained. He concluded that Claimant's permanent loss of physical function as a result of the injury was between 15 and 20%.

Claimant contends that this claim is within the jurisdiction of the Act and that he has sustained a 20% permanent loss of use of the right foot. The Employer takes the position that this claim is not within the Act's jurisdiction and that Claimant has suffered no more than a 15% loss of use of the right foot.

CONCLUSIONS OF LAW

The main issue is whether or not Claimant's employment brings him within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act.

To qualify for coverage, Claimant must come within the definition of an employee which Section 2(3) of the Act defines as:

> . . . any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker . . .

Claimant was a checker. Congress clearly intended that checkers who are directly involved in loading or unloading operations would be covered by the Act.[2]

Decisions of Administrative Law Judges and the Benefits Review Board of this department have consistently given the terms "maritime employment" and "loading and unloading of vessels" broad constructions in consonance with Congress' intent that the Act be liberally construed to effectuate its humanitarian goals. *Avvento v. Hellenic Lines, Ltd.*, BRB No. 74-153 (November 12, 1974); *Adkins v. I. T. O. Corporation of Baltimore*, BRB No. 74-123 (November 29, 1974); *Coppolino v. International Terminal Operating Company, Inc.*, BRB No. 74-136 (December 2, 1974); *Brown v. Maritime Terminals, Inc.*, BRB Nos. 74-177 and 74-177A (December 6, 1974); *Herron v. Brady-Hamilton Stevedore Company*, BRB No. 74-171 (January 23, 1975); *Kelley v. Handcor, Inc.*, BRB No. 74-165 and

2. Both the Senate and House Committee Reports for the 1972 amendments stated: "However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the amendment." *S. Rep. 92-1125*, 92nd Cong. 2d Sess. 12 (1972); *H. Rep. 92-1441*, 92nd Cong. 2d Sess. 11 (1972).

74-165A (February 28, 1975); *Mason v. Dominion Stevedoring Compensation*, BRB Nos. 74-182 and 74-182A (March 21, 1975).

In *Coppolino* a head foreman and hiring agent was found to be a covered employee as was an employee who was injured when he fell in a parking lot in *Mason* and a worker who was operating a forklift in a warehouse in *Brown*. To be covered it is sufficient that an employee be performing tasks which are part of a series of longshoring operations. *Adkins v. I. T. O. Corporation of Baltimore* (*supra*). The Benefits Review Board stated the rule as follows in the *Avvento* decision:

> Thus it is clear that until cargo is delivered to a trucker or other carrier who is to pick it up for further trans-shipment, such cargo is in maritime commerce and all employees engaged in its movement to that point are engaged in maritime employment.

Claimant's duties directly involved him in the process of loading and unloading vessels. His work at the time of his injury consisted of keeping tallies of bundles of pipe that were being loaded onto a flatbed trailer at a marine pier. The pipe was being moved to another pier where it was to be loaded onto a ship. Claimant's work was an integral part of the loading process. Therefore his claim comes within the jurisdiction of the Act.

I further find that as a result of the accident Claimant was temporarily totally disabled for 40 weeks; that he sustained a 20% permanent loss of use of the right foot; and that Claimant is entitled to be paid compensation at the weekly rate of $167.00.

Claimant therefore is entitled to receive from the employer:

1. Compensation for temporary total disability totalling $6,680.00 (40 weeks at $167.00 per week) less any sums paid pursuant to state law.

2. Compensation for a 20% permanent loss of use of the right foot totalling $6,847.00 (41 weeks at $167.00 per week).

3. Interest of six percent per annum from the date that each payment was due until paid.

4. Payment of all Claimant's reasonable medical expenses resulting from the disabling injury, pursuant to Section 7 of the Act.

Leonard Spear, Esq. is entitled to receive from the Employer the sum of $1800.00 which I find to be the reasonable value of legal services that he rendered to Claimant herein and the sum of $87.50 as reimbursement for expenses incurred, pursuant to Section 28(a) of the Act.

ORDER

The Employer, Independent Pier Company, shall pay:

1. To Claimant, John Lind, compensation for temporary total disability of $6,680.00 and for a 20 percent permanent loss of use of the right foot of $6,847.00, less any sums previously paid, with interest of six percent per annum from the date that each payment was due until paid.

2. All of Claimant's reasonable medical expenses resulting from the disabiling injury.

3. To Leonard Spear, Esq. the sum of $1,887.50 for legal services rendered to Claimant and expenses incurred in this matter.

EDWIN S. BERNSTEIN
Edwin S. Bernstein
Administrative Law Judge

Dated: July 17, 1975
Washington, D. C.

U. S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D. C. 20210

BRB No. 75-211

JOHN LIND
Claimant-Respondent

v.

INDEPENDENT PIER COMPANY
Self-Insured Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party in Interest

DECISION.

Appeal from Decision and Order of Edwin S. Bernstein, Administrative Law Judge, United States Department of Labor.

Leonard Spear (Meranze, Katz, Spear & Wilderman), Philadelphia, Pennsylvania, for the claimant.

Thomas J. Ingersoll (Deasey, Scanlan & Bender, Ltd.), Philadelphia, Pennsylvania, for the employer.

Before: Washington, Chairperson, Hartman and Miller, Members.

Hartman, Member:

This is an appeal by the employer from the Decision and Order (74-LHCA-29) of Administrative Law Judge Edwin S. Bernstein, dated July 17, 1975, awarding compensation to the claimant under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 901 *et seq.* (hereinafter referred to as the Act).

This case was initially appealed to the Board from a Decision and Order of Administrative Law Judge Herman T. Benn but was remanded for a more complete determination of the issues involved. 1 BRBS 171, BRB No. 74-162, Nov. 26, 1974. Upon remand, compensation was awarded under the Act.

Claimant, while within the scope of his employment, lost the partial use of his right foot when it was fractured as the result of an accident in 1973. The administrative law judge awarded the claimant compensation for temporary total disability and permanent partial disability for a 20% loss of use of his right foot pursuant to Sections 8(b) and 8(c)(4) of the Act. 33 U. S. C. §§ 908(b), 908(c)(4).

In his appeal, the employer contests the jurisdiction of the Act, claiming that the claimant was not directly involved in the loading or unloading of a vessel and therefore not within its purview under Sections 2(3), 2(4) of the Act. 33 U. S. C. §§ 902(3), 902(4).

The record shows that at the time of his injury, the claimant was working for the employer as a checker. The claimant's duties were to keep tallies of bundles of pipe which were being loaded onto a flatbed trailer truck for removal from the pier to another terminal for subsequent loading aboard a ship. While performing these duties, the claimant was involved in an accident in which his foot was crushed.

The Board has determined that its interpretation of the status requirement is in accord with the intent of the 1972 amendments to the Act, and will adhere to that interpretation although the Fourth Circuit Court of Appeals in *I. T. O. Corporation of Baltimore v. Adkins,* Nos. 75-1051, 75-1075, 75-1088, 75-1196 (4th Cir. Dec. 22, 1974), has taken a more restrictive view of those amendments. *Bradshow v. J. A. McCarthy, Inc.,* — BRBS — , BRB No. 75-209 (Jan. 26, 1976).

The administrative law judge determined that the claimant was under the jurisdiction of the Act at the time of his injury. We agree. At the time of injury, the duties which the claimant was performing were typically those of a longshore checker; he was keeping tallies of bundles of pipe which were to be eventually loaded on board ship. His overall job description also included the checking of cargo at various other places on board ship and around the surrounding terminal areas. The spotting of cargo for loading on board ship is an essential part of longshoring operations.

The claimant therefore meets the status requirement of an employee under Section 2(3) of the Act which is defined to be ". . . any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . ."

In addition, the legislative history, Senate Report No. 92-1125, 92d Cong., 2d Sess. 13 (1972), explaining extension of the coverage provisions of the 1972 amendments, clearly supports this determination. "[C]heckers . . . who are directly involved in the loading or unloading functions are covered by the new amendment."

The claimant's injury, which occurred in the open yard area of the terminal, satisfies the situs requirements for jurisdiction under Sec. 3(3) of the Act in which nav-

igable waters was defined to include ". . . any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other *adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.*" *Mininni v. Pittston Stevedoring Corp.*, 1 BRBS 428, BRB No. 74-195 (May 1, 1975).

We agree with the finding of jurisdiction by the administrative law judge and affirm his Decision and Order.

RALPH M. HARTMAN
Ralph M. Hartman, Member

We Concur:

RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

JULIUS MILLER
Julius Miller, Member

Dated this 19th day
of February 1976

SERVICE SHEET

BRB No. 75-211: JOHN LIND v. INDEPENDENT PIER COMPANY AND AMERICAN MUTUAL INSURANCE COMPANY (Case No. 74-LHCA-29)

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U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210

Case No. 74-LHCA-72
OWCP No. 3-5775

IN THE MATTER OF
JAMES W. PARKS

Claimant

v.

LAVINO SHIPPING COMPANY

Self-Insured Employer

Leonard Spear, Esquire
Merange, Katz, Spear & Wilderman
Twelfth Floor—Lewis Tower Building
15th & Locusts Streets
Philadelphia, Pennsylvania 19102

For the Claimant

Thomas J. Ingersoll, Esquire
Deasey, Scanlan & Bender, Ltd.
Suite 2900
Two Girard Plaza
Philadelphia, Pennsylvania 19102

For the Employer

Before: EDWIN S. BERNSTEIN
Administrative Law Judge

DECISION AND ORDER.

This matter presents a question of law relating to jurisdiction pursuant to Section 2(2) of the Longshoremen's

and Harbor Workers' Compensation Act, 33 U. S. C. 901 *et seq.*

FINDINGS OF FACT

The parties stipulated and I find the following facts:

1. On May 15, 1973, Claimant, James W. Parks was injured in the course of his employment as a cargo checker for Lavino Shipping Company ("the Employer"). Claimant was a member of Local 1242 of the International Longshoremen's Association (AFL-CIO).[1]

2. Claimant's specific duties on May 15, 1973, consisted of checking bales of nylon fiber that were stored on pallets at Pier 82, South Wharves, Philadelphia, Pennsylvania, prior to their being loaded onto trucks for delivery to a consignee. The pallet loads of cargo were stored two high on the pier. A fork lift operator also employed by Lavino Shipping Company removed the second tier. When he did this, the boards on the pallet separated and one of the bales of nylon fell from the pile striking Claimant and fracturing his left leg. The bales had been discharged from a vessel at Pier 82 on May 5, 6 and 7, 1973.

[1] Under the terms of a collective bargaining agreement between members of the Philadelphia Marine Trade Association and Locals 1242 and 1883 of the International Longshoremen's Association (AFL-CIO) clerks and checkers (also referred to as tallymen) have exclusively jurisdiction over the performance of the following work:

(1) All clerking and checking at marine piers and marine terminals where required.

(2) The clerking and checking involved in the receiving and delivering of all freight from vessel to pier or marine terminal and from pier or marine terminal to vessel.

(3) The clerking and checking where required in the receiving and delivering of all cargoes to and from trucks and/or other conveyances including railroad cars or lighters at piers or marine terminals.

(4) The placing of rail cars on piers and marine terminals.

(5) The clerking and checking of vans, containers, and pallets, etc. When the foregoing are shipped by one shipper or received by one consignee, they shall be received or delivered intact. When a van or container is shipped by more than one consignee, they shall be loaded or stripped on the pier or marine terminal.

Clerks and checkers shall have the work of checking and making records of containers received or delivered at piers in the Port of Philadelphia.

3. Claimant's average weekly wages at the time of his accident was $300.64. Claimant was temporarily, totally disabled for the period from May 15, 1973 to October 29, 1973, for which the Employer paid to Claimant compensation at the rate of $100.00 per week in accordance with the Pennsylvania Workmen's Compensation Act. Claimant was also temporarily, totally disabled from November 14, 1974, to December 1, 1974. Claimant's periods of temporary, total disability as a result of the accident totalled 28⅔ weeks.

4. As a result of the accident, Claimant suffered a permanent partial disability equivalent to a twenty percent loss of use of the left leg.

CONCLUSIONS OF LAW

The sole issue is whether or not Claimant's employment brings him within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act.

To qualify for coverage, Claimant must come within the definition of an employee which Section 2(3) of the Act defines as:

> . . . any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker . . .

Claimant was a checker. Congress clearly intended that checkers who are directly involved in loading or unloading operations would be covered by the Act.[2]

Decisions of Administrative Law Judges and the Benefits Review Board of this department have consistently given the terms "maritime employment" and "loading and unloading of vessels" broad constructions in consonance with Congress' intent that the Act be liberally construed to effectuate its humanitarian goals. *Avvento v. Hellenic Lines, Ltd.*, BRB No. 74-153 (November 12, 1974); *Adkins v. I. T. O. Corporation of Baltimore*, BRB No. 74-123 (November 29, 1974); *Coppolino v. International Terminal Operating Company, Inc.*, BRB No. 74-136 (December 2, 1974); *Brown v. Maritime Terminals, Inc.*, BRB Nos. 74-177 and 74-177A (December 6, 1974); *Herron v. Brady-Hamilton Stevedore Company*, BRB No. 74-171 (January 23, 1975); *Kelley v. Handcor, Inc.*, BRB No. 74-165 and 74-165A (February 28, 1975); *Mason v. Dominion Stevedoring Corporation*, BRB Nos. 74-182 and 74-182A (March 21, 1975).

In *Coppolino* a head foreman and hiring agent was found to be a covered employee as was an employee who was injured when he fell in a parking lot in *Mason* and a worker who was operating a forklift in a warehouse in *Brown*. To be covered it is sufficient that an employee be performing tasks which are part of a series of longshoring operations. *Adkins v. I. T. O. Corporation of Baltimore* (*supra*). The Benefits Review Board stated the rule as follows in the *Avvento* decision:

> Thus it is clear that until cargo is delivered to a trucker or other carrier who is to pick it up for further trans-shipment, such cargo is in maritime commerce and all employees engaged in its movement to that point are engaged in maritime employment.

2. Both the Senate and House Committee Reports for the 1972 amendments stated: "However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the amendment." *S. Rep. 92-1125*, 92nd Cong. 2d Sess. 12 (1972); *H. Rep. 92-1441*, 92nd Cong. 2d Sess. 11 (1972).

Claimant's duties directly involved him in the process of loading and unloading vessels. His work in checking the bales of nylon fiber which had been discharged from a vessel prior to their being loaded onto trucks at the pier is an integral part of the unloading process. Therefore his claim comes within the jurisdiction of the Act.

Claimant therefore is entitled to receive from the Employer:

1. Compensation for temporary total disability for 28¾ weeks at the rate of $167.00 per week, totalling $4723.71 less any sums paid under state law.

2. Compensation for a 20 percent permanent loss of use of the left leg totalling $9,619.20 (57.6 weeks times $167.00 per week).

3. Interest of six percent per annum from the date that each payment was due until paid.

4. Payment of all of Claimant's reasonable medical expenses resulting from the disabling injury, pursuant to Section 7 of the Act.

Leonard Spear, Esq. is entitled to receive from the Employer, the sum of $1800.00 which I find to be the reasonable value of legal services that he rendered to Claimant herein and the sum of $112.50 as reimbursement for expenses incurred, pursuant to Section 28(a) of the Act.

ORDER

The Employer, Lavino Shipping Company shall pay:

1. To Claimant, James W. Parks, compensation for temporary, total disability of $4723.71 and for a 20 per-

cent permanent loss of use of the left leg of $9,619.20, less any sums previously paid, with interest of six percent per annum from the date that each payment was due until paid.

2. All of Claimant's reasonable medical expenses resulting from the disabling injury.

3. To Leonard Spear, Esq. the sum of $1912.50 for legal services rendered to Claimant and expenses incurred in this matter.

EDWIN S. BERNSTEIN
Edwin S. Bernstein
Administrative Law Judge

Dated: July 17, 1975
Washington, D. C.

CERTIFICATE OF FILING AND SERVICE

I certify that on July 25, 1975 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Third Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. James Parks
Claimant
1846 E. Hazzard Street, Philadelphia, Pa. 19125

Lavino Shipping Company
Insurance Carrier or Employer (if self-insured)
21 Snyder Avenue, Philadelphia, Pa. 19148

Leonard Spear, Esquire	Thomas J. Ingersoll, Esquire
Merange, Katz, Spear & Wilderman	Deasey, Scanlan & Bender, Ltd.
12th Floor—Lewis Tower Bldg.	Suite 2900
15th & Locust Streets	Two Girard Plaza
Philadelphia, Pa. 19102	Philadelphia, Pa. 19102
For the Claimant	For the Employer

A copy was also mailed by regular mail to the following:

Judge Bernstein, Office of Administrative Law Judges, U. S. Department of Labor, Washington, D.C. 20210

Office of the Solicitor, U. S. Dept. of Labor, Division of Employee Benefits, Rm. 4221, Main Labor Bldg. Wash., D.C. 20210

Director, Office of Workmen's Compensation Programs, (LS/HW)
U. S. Department of Labor, Washington, D.C. 20211

Donald Frederich/jm
Deputy Commissioner
Third Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workmen's Compensation Programs

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D. C. 20210

BRB No. 75-212

JAMES W. PARKS
Claimant-Respondent

v.

LAVINO SHIPPING COMPANY
Self-Insured Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party in Interest

DECISION

Appeal from Decision and Order of Edwin S. Bernstein,
Administrative Law Judge, United States Department of Labor

Leonard Spear (Meranze, Katz, Spear and Wilderman),
Philadelphia, Pennsylvania, for the claimant.

Thomas J. Ingersoll (Deasey, Scanlan and Bender, Ltd.),
Philadelphia, Pennsylvania, for the employer.

Joshua T. Gillelan, II (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D. C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

This is an appeal by the employer from the Decision and Order (74-LHCA-72) of Administrative Law Judge Edwin S. Bernstein, dated July 17, 1975, awarding compensation to the claimant under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 901 *et seq.* (hereinafter referred to as the Act).

This case was initially appealed to the Board from a Decision and Order of Administrative Law Judge Herman T. Benn, but was remanded for a more complete determination of the issues involved. (1 BRBS 171, BRB No. 74-163, November 26, 1974). On remand, claimant was awarded benefits under the Act. It has been appealed by the employer on the issue of jurisdiction.

Claimant was injured while within the scope of his employment on May 15, 1973 and was awarded temporary total disability compensation and permanent partial disability compensation for a 20% loss of use of his left leg.

The record shows that at the time of his injury, the claimant was working as a checker at Pier 82 in Philadelphia. It was his responsibility to check bales of nylon fiber, off-loaded from a vessel ten days earlier and stacked on the pier, prior to delivery to consignees. An accident involving a forklift caused such a bale to fall, striking the claimant, and fracturing his leg.

The sole issue raised in the employer's appeal is one of jurisdiction under Sections 2(3), 2(4) and 3(a) of the Act. 33 U. S. C. §§ 902(3), 902(4), 903(a).

The Board has determined that its interpretation of the status requirement is in accord with the intent of the 1972 amendments to the Act, and will adhere to that interpretation although the Fourth Circuit Court of Appeals

in *I. T. O. Corporation of Baltimore v. Adkins,* Nos. 75-1051, 75-1075, 75-1088, 75-1196 (4th Cir. Dec. 22, 1975), has taken a more restrictive view of those amendments. *Bradshaw v. J. A. McCarthy, Inc.,* – BRBS – , BRB No. 75-209 (Jan. 26, 1976).

The claimant was injured while checking bales of nylon fiber which were located on the pier. The claimant's other assignments routinely included checking cargo on board ship in the process of being loaded or unloaded, or locating cargo that was scheduled for loading. All of the tasks are loading functions as they pertain to checkers. Consequently, the administrative law judge determined that the claimant was under the jurisdiction of the Act at the time of his injury and we agree. The legislative history, Senate Report No. 92-1125, 92d Cong., 2d Sess. 13 (1972), explaining extension of the coverage provisions of the 1972 Amendments, clearly supports this determination. "[C]heckers . . . who are directly involved in the loading or unloading functions are covered by the new amendment."

We agree with the finding of jurisdiction by the administrative law judge, and, accordingly, affirm his Decision and Order.

RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

We Concur:

RALPH M. HARTMAN
Ralph M. Hartman, Member

JULIUS MILLER
Julius Miller, Member

Dated this 20th day
of February 1976

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D. C. 20210

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Case No. 75-LHCA-412
OWCP No. 3-6866

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In the Matter of:

WILLAM FAIRMAN,
Claimant

v.

J. A. McCARTHY, INC.
Employer

SELF-INSURED

RICHARD WEISBORD, ESQ.
Freedman, Borowsky & Lorry
Lafayette Building—Eighth Floor
Chestnut Street at Fifth
Philadelphia, Pa. 19106
For the Claimant

THOMAS J. INGERSOLL, ESQ.
Deasey, Scanlan & Bender, Ltd.
Suite 2900
Two Penn Center Plaza
Philadelphia, Pa. 19102
For the Employer

Before: DAVID W. PELKEY
Administrative Law Judge

DECISION AND ORDER.

Claimant seeks compensation for temporary total disability from January 29 through March 31, 1974, Claimant's counsel fees and reimbursement of expenses Claimant incurred for attendance at hearings, all as a result of a January 28, 1974, injury, under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. 901 *et seq.*, (the Act). This Decision and Order follows a May 22, 1975, hearing that was conducted in accordance with 5 U. S. C. 554. At that hearing, the parties represented that they had reached agreements as to the issue to be adjudicated and as to the facts to be taken as admitted. The agreements, framed as stipulations, follow:

STIPULATION OF ISSUE TO BE ADJUDICATED

Whether an injury suffered by a longshoreman on the apron of Employer's pier, while performing the duties of a "cooper" by repairing bags containing cargo that had been removed from a vessel, placed inside the pier, then brought to him on the apron, is within the coverage of the Act.

STIPULATION OF FACTS TO BE TAKEN AS ADMITTED

On January 28, 1974, Claimant was injured at Tioga Terminal, Philadelphia, Pa., in the course of his employment, as a result of which he sustained a fracture of a heel bone.

In connection with the injury, Claimant was temporarily and totally disabled from January 29 through March 31, 1974; he returned to work on April 1, 1974, and has worked since then without interruption due to the injury.

Employer has paid Claimant benefits during the period of temporary total disability under the Pennsylvania Workmen's Compensation Act.

Claimant's 1973 earnings totalled $12,885.81. At the time of the injury, Claimant's average weekly wages was $247.80.

Statement of the Case

Claimant testified that he has been a wood butcher for 8 years, that he was a member of local 1566 of the longshoremen's union, that he is assigned to work through a union hiring hall in Philadelphia, Pa., and that, at the time of the hearing, he was working for an employer other than Employer. He testified that his duties as a wood butcher require him to secure (fence and lash down) cargo that longshoremen have placed on vessels along the Philadelphia waterfront.

Additionally, Claimant testified that he is a cooper. As such, he works on a pier and mends bags and boxes that have been taken from a vessel. On occasions, such work is accomplished on board a vessel.

The witness said that members of three locals of the longshoremen's union perform duties at Tioga Terminal:

> A) Members of Local 1291 take cargo from a vessel and put it at a place of rest on the pier; they also take cargo from a place of rest and put it on a vessel.
>
> B) Members of Local 1332 take cargo from the place of rest on the pier to a box car or truck to be removed from the pier; they also take cargo from the place of rest to an apron, where Claimant performs his cooper functions, and from the apron to the box car or truck.

> C) Members of Local 1566 perform the duties of wood butchers and coopers; as wood butchers, members are required to work on vessels with members of Local 1291 when cargo is being placed aboard or removed.

All such members are employed by Employer.

Claimant stated that on January 28, 1974, between 11:00 a.m., and 11:30 a.m., he was at the apron of the pier working as a cooper on bags that had been brought from inside the pier. He was sewing damaged cocoa bean bags so they could be placed in a box car. He did not know how or when the bags were damaged, but it was his opinion that, at the time of the accident, vessels were unloading at the pier. He knew that some box cars had been filled and their doors had been closed and sealed.

While he was so working, a machine that was carrying bags of cocoa beans to a platform for loading on box cars struck him, caught him between two pallets, and broke his heel bone.

Neither party submitted additional witness and neither party tendered documentation as exhibits.

Discussion

Subsequent to the hearing, Claimant filed a brief in which its principal thrust was that, at the time of the injury, Claimant was engaged in longshoring operations. Decisions of the Benefits Review Board, submitted as representative of the Board's broad interpretation of loading and unloading processes, were designed to support the position. Additionally, Claimant submitted that, assuming that no longshoring operation attended his activity, he was engaged in harbor work, an activity covered by the Act. Finally, Claimant adopted the position that the location

where the injury occurred is one that is included in the statutory definition of navigable waters of the United States.

Solicitor, Department of labor, submitted a memorandum that addressed jurisdiction in a manner that was consistent with and is considered to be supportive of the positions adopted by Claimant.

On brief, Employer submitted that Claimant was neither loading/unloading a vessel nor directly engaged in an activity in support of such loading/unloading at the time of his injury; therefore, his injury is not within the coverage of the Act. Assuming the accuracy thereof, the submission is not supported by judicial determination or the legislative history of the 1972 amendments of the Act.

In *Beasley v. O'Hearne, et al.*, D. C., S. D., W. Va., Feb. 8, 1966, 250 F. Supp. 49, the court held that it is sufficient for coverage under the Act if an employee's duties only in part involve maritime employment. Such was not a determination that an employee had to be engaged in activity that constituted maritime employment at the time of injury. It was a determination that, at the time of an injury, an employee's duties had to include, if only in part, activity that constituted maritime employment.

The position taken by the Committee on Education and Labor, United States House of Representatives, in House Report No. 92-1441, September 25, 1972, constituting legislative history attending the 1972 amendments of the Act, is consistent with the position adopted by the referenced court. The discussion of the proposed extension of the Act's coverage to shoreside areas includes the following statements (italics supplied):

> "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for *part of their activity.* ° ° ° The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activities. Thus, employees whose responsibility is *only* to pick up cargo for further trans-shipment would not be covered, ° ° °. Likewise, the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person *at least some of whose employees are engaged, in whole or in part,* in some form of maritime employment. Thus, an individual employed by a person *none of whose employees work, in whole or in part,* on navigable waters, is not covered ° ° °."

The foregoing leads to adoption of the proposition that a determination as to whether, at the time of the injury, Claimant was engaged in loading/unloading activities or whether he was directly engaged in an activity in support of loading/unloading is not controlling in the resolution of the jurisdictional issue. In the instant matter, the controlling consideration involves the determination as to whether Claimant's duties, under his employment contract, regularly and routinely included activities that are covered by the broad concept of maritime employment.

Uncompromised testimony established that Claimant regularly and routinely performed the duties of a wood butcher and a cooper as part of his employment contract. As a butcher, he was required to secure cargo that had been placed on vessels. As a cooper, he was required to mend cargo bags and boxes that had been taken from a vessel and that, from time to time, were still on vessels. No violence is done to the position adopted by Employer

by determining that such activities are directly involved in vessel loading/unloading. More importantly, however, such duties are maritime in nature, serve a maritime purpose and constitute duties covered by the concept of maritime employment.

Notably, the parties agree that Claimant sustained the injury, that he was doing what he should have been doing at the proper time and place at the time of the injury, and that the injury resulted in a disability.

All of the foregoing supports the determination that, for the purpose of resolution of the instant claim, Employer, Claimant, the injury, and the disability are covered by the provisions of and are to treated under the Act.

Claimant has requested that he be reimbursed for expenses incurred in connection with attendance at hearings relating to the claim. Generally, a party is not entitled to witness fee and mileage costs for his attendance at court hearings (*Picking v. Pennsylvania R. Co.*, 11 F. R. D. 71, Jan. 2, 1951). Hearings hereunder are equated, for such purpose, with court hearings, Claimant has tendered no justification for considering his situation as an exception to the general rule. Accordingly, it is determined that he is not entitled to the requested reimbursement.

Claimant's counsel submitted a petition requesting an award of a fee for services rendered herein. He represented that a copy thereof, along with a copy of his brief, was forwarded to Employer's counsel. At the hearing, Employer's attorney was asked to forward his comments on the petition for fee, if any, to the administrative law judge. To date, no such comments have been received. Accordingly, it is determined that Employer has no objection to the allowance of the requested fee. As detailed in the petition, the services and charges therefore are found to be reasonable except for the services on July 15 and September 14, 1974, relating to the proceedings under

Pennsylvania law. Services therein are not considered to be services reasonably required for relief under the Act. Accordingly, award of a fee for services totalling 20¼ hours, at counsel's stated hourly rate, is deemed to be justified and is hereby approved.

Claimant's counsel has also requested that the cost attending procurement of the transcript of the hearing be assessed against Employer. He has represented neither that the transcript was reasonably required nor that there is statutory support for so assessing such a cost. Accordingly, the request is denied.

Findings of Fact

1) On January 28, 1974:

A) Claimant was employed by Employer as a longshoreman to perform the duties of a cooper and wood butcher of Tioga Terminal, Philadelphia, Pa.

B) Employer was engaged in the business of performance of stevedore contracts, and had employees engaged in that business at the referenced terminal, a facility that adjoins waters used by vessels in international commerce.

C) While performing assigned duties at the time and location designated for such performance (which location was within the facility heretofore identified), Claimant suffered an accidental injury, as follows: during the time he was on the apron of Employer's pier, sewing cargo bags, he was struck by a cargo-bearing vehicle and caught between two pallets, as a consequence of which he sustained a broken heel.

D) On the basis of previous earnings in the employment in which he was then working, Claimant's average weekly wages was $247.80.

2) As a result of the January 28, 1974, injury:

A) Claimant was unable to work from January 29, 1974 through March 31, 1974.

B) During the period cited, Employer paid Claimant compensation under the Pennsylvania Workmen's Compensation Act.

Conclusions of Law

1) On January 28, 1974:

A) Claimant was a person engaged in maritime employment.

B) Employer had employees who were engaged in maritime employment upon the navigable waters of the United States.

C) Claimant suffered an accidental injury that arose out of and in the course of his employment, which injury occurred upon the navigable waters of the United States.

2) Because of the injury, Claimant suffered an incapacity to earn the wages that he was receiving, at the time of the injury, in the same or any other employment.

3) As a consequence of the incapacity suffered by Claimant, Employer is obligated to pay Claimant compensation for temporary total disability from January 29, 1974 through March 31, 1974, the weekly sum of $165.20.

4) For services rendered Claimant herein Employer is obligated to pay Claimant's attorney a reasonable fee.

Decision

The January 28, 1974, injury suffered by Claimant on the apron of Employer's pier, while performing the duties

of a cooper by repairing cargo-containing bags that had been removed from a vessel, placed inside the pier, then brought to him on the apron, is within the coverage of the Act.

ORDER

That Employer pay Claimant, as and for temporary total disability from January 29, 1974 through March 31, 1974, compensation at the weekly rate of $165.20.

That, as to any installment of compensation that was required to be but was not paid within 14 days after it became due, Employer pay Claimant an additional amount equal to 10 percentum of any such installment.

That, as to any installment not paid when due, Employer pay Claimant interest at an annual rate of 6 percent until date of payment.

That Employer deduct, from amounts due and payable under this Decision and Order, any amounts paid to Claimant, for the injury, under the Pennsylvania Workmen's Compensation Act.

That Employer pay Richard A. Weisbord, Esq. $1518.75 for services rendered Claimant herein.

David W. Pelkey
David W. Pelkey
Administrative Law Judge

Dated: August 4, 1975
Washington, D. C.

U. S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D. C. 20210

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BRB No. 75-221

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WILLIAM FAIRMAN
Claimant-Respondent

v.

J. A. McCARTHY, INC.
Self Insured Employer-Petitioner

DECISION.

Appeal from Decision and Order of David M. Pelkey Administrative Law Judge, United States Department of Labor.

Richard Weisbord (Freedman, Borowsky and Lorry), Philadelphia, Pennsylvania, for the claimant.

Thomas J. Ingersoll (Deasey, Scanlan and Bender, Ltd.), Philadelphia, Pennsylvania, for the employer/carrier.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

This is an appeal from the Decision and Order of Administrative Law Judge David M. Pelkey (75-LHCA-412) in a claim arising under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 901 *et seq.* (hereinafter referred to as the Act).

On January 28, 1974, while working as a cooper on the apron of a pier at Tioga Terminal, Philadelphia, Pa., claimant sustained a fracture of the heel bone when he was struck by a machine that was carrying cocoa bags. In his capacity as a cooper, claimant was repairing damaged cocoa bean bags. These bags had been removed from a vessel and placed inside the pier. They were then brought to the cooper out on the apron. After claimant repaired the bags, they were to be loaded onto railroad cars for further trans-shipment.

The administrative law judge found that the cooper was an employee as defined by the Act and awarded compensation for temporary total disability from January 29, 1974 to March 31, 1974.

The employer now appeals, alleging that a cooper in this factual setting was not an employee under Section 2(3) of the Act, 33 U. S. C. § 902(3), because he was not directly engaged in loading or unloading a vessel, and that the attorney fees awarded were excessive.

Upon an examination of the record, it is clear that claimant is an employee under the Act. Section 2(3) defines an employee as "[a]ny person engaged in maritime employment."

In this case, the cargo bags that the claimant was working on had to be repaired before they could be loaded onto railroad cars for further shipment. Until the cooper finishes his job, the cargo's movement is delayed. Therefore, the cooper's function is an integral step in the cargo's movement *before* trans-shipment. The Board has found that

> [U]ntil cargo is delivered to a trucker or other carrier who is to pick it up for further trans-shipment, such cargo is in maritime commerce and all employees en-

gaged in its movement to that point are engaged in maritime employment. *Avvento v. Hellenic Lines, Ltd.*, 1 BRBS 174, BRB No. 74-153 (Nov. 12, 1974). *See also Blundo v. Int'l Terminal Operating Co., Inc.*, 2 BRBS 376, BRB No. 75-142 (Oct. 30, 1975); *DiSomma v. John W. McGrath Corp.*, 1 BRBS 433, BRB No. 74-199 (April 30, 1975). Therefore, claimant was engaged in maritime employment at the time of injury and is an employee under Section 2(3) of the Act.

Petitioner contends that the cargo having been unloaded from a vessel onto the pier has come to a "point of rest." Any further actions, it argues, would be out of maritime commerce. The Board in *Bryant v. Ayers Steamship Co.*, 2 BRBS 408, BRB No. 75-137 (Nov. 13, 1975), has indicated that it does not subscribe to a "point of rest" theory. All longshoring operations performed in an area which is within the Act's expanded definition of "navigable waters", 33 U. S. C. § 903(a), bear a direct relationship to maritime commerce, constitute the performance of a maritime service and are maritime employment within the meaning of the Act.

The Board has determined that its interpretation of the status requirement is in accord with the intent of the 1972 amendments to the Act, and will adhere to that interpretation although the Fourth Circuit Court of Appeals in *I. T. O. Corporation of Baltimore v. Adkins*, Nos. 75-1051, 75-1075, 75-1088, 75-1196 (4th Cir. Dec. 22, 1975), has taken a more restrictive view of those amendments. *Bradshaw v. J. A. McCarthy, Inc.*, 3 BRBS , BRB No. 75-209 (Jan. 26, 1976).

The Board does not agree with petitioner's allegation that the attorney fees were excessive. This case is governed by Section 28(a) of the Act, 33 U. S. C. § 928(a),

which provides attorney fees upon claimant's successful litigation where the employer "declines to pay any compensation . . . on the ground that there is no disability within the provisions of the Act." The fact that the employer paid compensation under a state workmen's compensation law does not alter the fact that it refused to pay compensation under the provisions of Section 14 of the Act, thereby making Section 28(a) applicable. *Kelley v. Handcor, Inc.*, 1 BRBS 319, BRB No. 74-165 (Feb. 28, 1975).

In *Kelley*, even though the difference between the sum awarded under the Longshoremen's Act and the state workmen's compensation act was only $383.63, the Board found the $500 attorney fee awarded to be too low. The Board stated that the services provided were worth more, for, in establishing coverage under the Act, the claimant is guaranteed that any further complication that might arise from the injury will be covered by the Act. Also, a claimant would not be able to secure the services of able and experienced counsel if compensation commensurate with the services performed were not allowed. Furthermore, the employer has not shown that the fee was arbitrary, capricious, or an abuse of discretion. *Offshore Food Services, Inc. v. Murillo*, 1 BRBS 9, BRB No. 141-73 (May 15, 1974), *aff'd*, No. 74-2754 (5th Cir. Dec. 12, 1975).

The claimant's attorney has requested approval of a fee for services rendered in successful defense of this appeal. Having submitted to the Board a statement of the extent and character of the necessary legal services rendered, in accordance with the applicable Rules and Regulations, 20 C. F. R. §§ 702.132, 802.203, the claimant's attorney is awarded a fee of $185 to be paid directly by the employer in a lump sum. 33 U. S. C. § 928.

Therefore, we affirm the Decision and Order of the administrative law judge.

RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

We Concur:

RALPH M. HARTMAN
Ralph M. Hartman, Member

JULIUS MILLER
Julius Miller, Member

Dated this 23rd day
of February, 1976.

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D. C. 20210

CASE NO. 74-LHCA-30
OWCP No. 3-5523

IN THE MATTER OF
ROBERT J. MULDOWNEY
Claimant

v.

LAVINO SHIPPING COMPANY
Self-Insured Employer

LEONARD SPEAR, Esquire
MERANGE, KATZ, SPEAR & WILDERMAN
Twelfth Floor—Lewis Tower Building
15th & Locust Streets
Philadelphia, Pennsylvania 19102
For the Claimant

THOMAS J. INGERSOLL, Esquire
DEASEY, SCANLAN & BENDER, LTD.
Suite 2900
Two Girard Plaza
Philadelphia, Pennsylvania 19102
For the Employer

BEFORE: EDWIN S. BERNSTEIN
Administrative Law Judge

DECISION AND ORDER.

This matter presents a question of law relating to jurisdiction pursuant to Section 2(2) of the Longshoreman's and Harbor Workers' Compensation Act, 33 U. S. C. 901 *et seq.*

Findings of Fact

The parties stipulated and I find the following facts:

1. On February 19, 1973, Robert J. Muldowney was injured in the course of his employment as a checker for Lavino Shipping Company ("the Employer"). Claimant was a member of Local 1242, of the International Longshoreman's Association (AFL-CIO).[1]

2. Claimant's specific duties on February 19, 1973 required him to drive an automobile around the open yard area of Packer Avenue Terminal with a list of containers that ultimately were to be loaded aboard a ship. Claimant would indicate on that list the location of the containers so that the "yard horse" drivers who were to deliver the containers to a vessel, when one arrived, would know the location of the container. The automobile that he was driving was owned and provided to him by his employer. The vessel onto which the containers that he was spotting was loaded arrived at the terminal on February 20, 1973.

1. Under the terms of a collective bargaining agreement between members of the Philadelphia Marine Trade Association and Locals 1242 and 1883 of the International Longshoremen's Association (AFL-CIO) clerks and checkers (also referred to as tallymen) have exclusively jurisdiction over the performance of the following work:

(1) All clerking and checking at marine piers and marine terminals where required.

(2) The clerking and checking involved in the receiving and delivering of all freight from vessel to pier or marine terminal and from pier or marine terminal to vessel.

(3) The clerking and checking where required in the receiving and delivering of all cargoes to and from trucks and/or other conveyances including railroad cars or lighters at piers or marine terminals.

(4) The placing of rail cars on piers and marine terminals.

(5) The clerking and checking of vans, containers, and pallets, etc. When the foregoing are shipped by one shipper or received by one consignee, they shall be received or delivered intact. When a van or container is shipped by more than one consignee, they shall be loaded or stripped on the pier or marine terminal.

Clerks and checkers shall have the work of checking and making records of containers received or delivered at piers in the Port of Philadelphia.

3. Claimant's average weekly wages at the time of the accident was $289.95. Claimant was temporarily, totally disabled for the following periods of time during 1973: February 20 to March 14; March 22 to March 26; March 31 to April 2; April 10 to April 12; April 15 to April 16; and April 26 to April 27 for which the Employer paid to Claimant compensation at the rate of $100.00 per week in accordance with the Pennsylvania Workmen's Compensation Act.

4. Claimant suffered no permanent disability as a result of the accident.

Conclusions of Law

The sole issue is whether or not Claimant's employment brings him within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act.

To qualify for coverage, Claimant must come within the definition of an employee, which Section 2(3) of the Act defines as:

> . . . Any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker.

Claimant was a checker. Congress clearly intended that checkers who are directly involved in loading or unloading operations would be covered by the Act.[2]

Decision of Administrative Law Judges and the Benefits Review Board of this department have consistently given the terms, "maritime employment" and "loading and unloading of vessels" broad constructions in consonance with Congress' intent that the Act be liberally construed to effectuate its humanitarian goals. *Avvento v. Hellenic Lines, Ltd.*, BRB No. 74-153 (November 12, 1974); *Adkins v. I. T. O. Corporation of Baltimore*, BRB No. 74-123 (November 29, 1974). *Coppolino v. International Terminal Operating Company, Inc.*, BRB No. 74-136 (December 2, 1974); *Brown v. Maritime Terminals, Inc.*, BRB Nos. 74-177 and 74-177A (December 6, 1974); *Herron v. Brady-Hamilton Stevedore Company*, BRB No. 74-171 (January 23, 1975); *Kelley v. Handcor, Inc.*, BRB Nos. 74-165 and 74-165A (February 28, 1975); *Mason v. Dominion Stevedoring Corporation*, BRB Nos. 74-182 and 74-182A (March 21, 1975).

In *Coppolino* a head foreman and hiring agent was found to be a covered employee as was an employee who was injured when he fell in a parking lot in *Mason* and a worker who was operating a forklift in a warehouse in *Brown*. To be covered it is sufficient that an employee be performing tasks which are part of a series of longshore operations. *Adkins v. I. T. O. Corporation of Baltimore (supra)*. The Benefits Review Board stated the rule as follows in the *Avvento* decision:

> Thus it is clear that until cargo is delivered to a trucker or other carrier who is to pick it up for further trans-shipment, such cargo is in maritime commerce and all employees engaged in its movement to that point are engaged in maritime employment.

2. Both the Senate and House Committee Reports for the 1972 amendments stated: "However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the amendment." *S. Rep. 92-1125*, 92nd Cong. 2d Sess. 12 (1972); *H. Rep. 92-1441*, 92nd Cong. 2d Sess 11 (1972).

Claimant's duties directly involved him in the process of loading and unloading vessels. His work in driving a vehicle around the open yard area of the terminal indicating the location of containers which were to be taken from the yard and loaded onto ships was an integral part of the loading process. Therefore this claim comes within the Act's jurisdiction.

Claimant therefore is entitled to receive from the Employer:

1. Compensation for temporary total disability of $167.00 per week for the stipulated periods of temporary total disability, less any sums paid pursuant to state law.

2. Interest of six percent per annum from the date that each payment was due until paid.

3. Payment of all of Claimant's reasonable medical expenses resulting from the accident.

Leonard Spear, Esq. is entitled to receive from the Employer the sum of $1400.00 which I find to be the reasonable value of legal services that he rendered to Claimant herein, taking into consideration all factors including the benefits involved, and the sum of $87.50 as reimbursement for expenses incurred, pursuant to Section 28(a) of the Act.

ORDER

The Employer, Lavino Shipping Company shall pay:

1. To Claimant, Robert J. Muldowney, compensation for temporary total disability at the rate of $167.00 per week for the periods of February 20 to March 14, 1973;

March 22 to March 26, 1973; March 31 to April 2, 1973; April 10 to April 12, 1973; April 15 to April 16, 1973; and April 26 to April 27, 1973, less any sums previously paid, with interest of six percent per annum for the date that each payment was due until paid.

2. All of Claimant's reasonable medical expenses resulting from the accident.

3. To Leonard Spear, Esq. the sum of $1487.50 for legal services rendered to Claimant and expenses incurred in this matter.

EDWIN S. BERNSTEIN
Edwin S. Bernstein
Administrative Law Judge

Dated: July 17, 1975
Washington, D. C.

U. S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D. C. 20210

BRB No. 75-210

ROBERT J. MULDOWNEY
Claimant-Respondent

v.

LAVINO SHIPPING COMPANY
Self-Insured Employer-
Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party in Interest

DECISION.

Appeal from Decision and Order of Edwin S. Bernstein,
Administrative Law Judge, United States Department of Labor.

Thomas J. Ingersoll (Deasey, Scanlan and Bender, Ltd.),
Philadelphia, Pennsylvania, for the employer.

Leonard Spear (Meranze, Katz, Spear and Wilderman),
Philadelphia, Pennsylvania, for the claimant.

Joshua T. Gillelan, II (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor),
Washington, D. C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

This is an appeal by the employer from the Decision and Order (74-LHCA-30) of Administrative Law Judge Edwin S. Bernstein, dated July 17, 1975, awarding compensation to the claimant under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 901 *et seq.* (hereinafter referred to as the Act).

This case was initially appealed to the Board from a Decision and Order of Administrative Law Judge Herman T. Benn, but was remanded for a complete determination of the issues involved. (1 BRBS 171, BRB No. 74-161, Nov. 26, 1974). Upon remand, compensation was awarded under the Act.

Claimant was injured in an industrial accident on February 19, 1973, and was awarded temporary total disability compensation for intermittent periods between February 20, 1973 and April 27, 1974 pursuant to Section 8(b) of the Act, 33 U. S. C. § 908(b).

The record shows that at the time of his injury, the claimant was employed as a checker, driving a company owned automobile around the open yard area of Packer Avenue Terminal at the Port of Philadelphia, in order to determine the location of various containers which were to be loaded on board ship.

The sole issue raised in the employer's appeal is whether there is jurisdiction under the Act where an industrial accident causes injury to a checker working on a pier. 33 U. S. C. §§ 902(3), 902(4).

We find that there is jurisdiction. The legislative history, Senate Report No. 92-1125, 92d Cong., 2d Sess. 13 (1972), explaining extension of the coverage provisions of the 1972 amendments clearly supports this determination. "[C]heckers . . . who are directly involved in the loading or unloading functions are covered by the new

amendment." Claimant was connected with the loading functions of the ship as *directly* as a checker could be in that he was responsible for the final locating of cargo which was ready to be loaded on board ship.

The Board has determined that its interpretation of the status requirement is in accord with the intent of the 1972 amendments to the Act, and will adhere to that interpretation although the Fourth Circuit Court of Appeals in *I. T. O. Corporation of Baltimore v. Adkins,* Nos 75-1051, 75-1075, 75-1088, 75-1196 (4th Cir. Dec. 22, 1975), has taken a more restrictive view of those amendments. *Bradshaw v. J. A. McCarthy, Inc.,* — BRBS — , BRB No. 75-209 (Jan. 26, 1976).

We agree with the finding of jurisdiction by the administrative law judge, and accordingly, affirm his Decision and Order.

RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

We Concur:

RALPH M. HARTMAN
Ralph M. Hartman, Member

JULIUS MILLER
Julius Miller, Member

Dated this 19th day
of February 1976

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D. C. 20210

Case No. 74-LHCA-262
OWCP No. 2-28044

IN THE MATTER OF
AUGUSTIN CABRERA
Claimant

v.

MAHER TERMINALS INC.
Employer

AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY
Carrier

Angelo C. Gucciardo, Esquire
Israel, Adler, Ronca & Gucciardo
160 Broadway
New York, New York

For the Claimant

Hugh J. Foley, Esquire
Foley, Smit & Morabito
55 Liberty Street
New York, New York 10005

For the Employer
and Carrier

Before: JOHN W. EARMAN
Administrative Law Judge

DECISION AND ORDER.

STATEMENT OF THE CASE

This is a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended

(33 U. S. C. 901 *et seq.*). Claimant seeks temporary total disability and permanent partial disability for an injury to his right arm. It was necessary to use a Spanish interpreter at the hearings because Claimant does not have a full command of the English language. Briefs were submitted by the parties and on behalf of the Director, Office of Workers' Compensation Programs.

Upon agreed facts, a two-fold issue is raised: At the time of injury was Claimant engaged in maritime employment so as to qualify as an employee under the coverage of Section 3(a) of the Act, and, if so, is the extension of coverage a violation of the Constitution?

FACTS

The parties have stipulated and it is found that on April 3, 1973, while employed by Maher Terminals, Inc. at its facility adjacent to navigable waters at Port Elizabeth, New Jersey, Claimant sustained an injury that resulted in temporary total disability until April 15, 1974 with a permanent loss of use of his right arm of 42½ percent, or 132.6 weeks compensation. It is further stipulated that Claimant's average weekly wage was $246.36, which resulted in a rate of $164.24, with the scheduled disability amounting to $21,778.22. Also stipulated was the payment under New Jersey Compensation Law by Respondents of the sum of $2,160.00 for the period from April 4, 1973 to August 22, 1973.

Claimant has worked as a longshoreman for nine years and is a member of the International Longshoremen's Association, Local 1235. On the day in question he was working as an "extra" or "terminal" laborer in warehouse No. 4000. The warehouse is within the fenced-in terminal area, which extends to the water's edge. Claimant can read and write Spanish but his English is poor.

At the time of the accident, Claimant testified, he was unloading a container which had been taken from a ship and was putting the cargo in the warehouse. While putting the cargo on a pallet so that a machine could transport it into the warehouse a box slipped and struck his right upper arm. He said that at the time he was working on the side of the warehouse farthest from the water.

Expert witness, Joseph Antanasio, described the container method of shipping and the union method of assigning work to members.

The former safety representative for Maher, Ken S. McGurk, filled out the injury report for the accident in question. On the report he listed "Berth 80, Door 57, in the truck" as the place of the accident. He described the accident as follows:

> "Individual alleges he was working in a truck loading a box. He placed it up high in the truck and it fell and hit him in the right shoulder and biceps after he placed it in the truck."

This description was obtained from Claimant along with personal identifying information. The witness did not know the Spanish words for "truck", "box" or "biceps."

Mr. Frank Judack, Vice-President of Operations for Maher Terminals testified that from the water's edge to the warehouse, is a distance of 2,000 feet. He said that after a container is unloaded from a ship and put on a dolly it is taken to the marshalling area, which is between the warehouse and the water. From the marshalling area the container is taken to the east side of the warehouse where it is backed into a doorway to be unloaded or stripped. The east side is used because concrete pads are available so that the wheels of the dolly will not sink into the macadam.

The west side of the building is the side furthest from the water and is where cargo is unloaded from private trucks or loaded on trucks for removal from the terminal. Records show that Door 57, which is on the west side of the building, was in use at the time of Claimant's injury for loading cargo that had arrived at the terminal in a vessel on March 26, 1973 and was stripped from the containers the following day.

The consignee is billed by Maher for labor performed in loading private trucks that remove cargo from the terminal. The sole business at the Maher terminal is loading and unloading vessels; it is not in the warehouse business. Cargo from vessels for delivery to consignees must be picked up within five days or an added charge (demurrage) is levied. Demurrage is charged so that a shipper is encouraged to remove his cargo from the terminal to make room for other cargo.

Opinion

1. Claimant's injury was within the coverage of the Act.

The evidence clearly establishes that, notwithstanding Claimant's testimony, he was engaged in loading cargo from the warehouse into a private truck at the time of the accident. Respondents contend that such activity is not maritime employment.

In 1972, Section 3(a) of the Act (33 U. S. C. 903(a)) was amended to read:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including, any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other

adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."

The definition of an "employer" was also expanded to cover the same specified shoreside facilities (33 U. S. C. 902(4)).

Section 2(3) (33 U. S. C. 902(3)) was amended to define "Employee" as

". . . any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . ."

There appears to be no dispute as to Maher Terminals' status as an employer under the Act. There is, however, a question raised as to whether distance from the water's edge puts the warehouse beyond the jurisdiction of the Act. It does not. The evidence shows that while the warehouse is 2,000 feet from the water it is situated within the terminal managed by the employer. In *Vinciquerra v. Transocean Gateway Corp.*, BRB Nos. 75-125 and 75-125A (June 5, 1975) the Benefits Review Board said: ". . . The 1972 Amendments to Section 3(a) specifically extend coverage to include the entire terminal area. On that basis alone, claimant's injury, sustained while engaged in maritime employment, falls within the protection of the Act. *See Mininni v. Pittston Stevedoring Corp. and Gulf Insurance Company*, 1 BRBS 428, BRB No. 74-195 (May 1, 1975); *Harris v. Maritime Terminals, Inc.*, 1 BRBS 301, BRB No. 74-178 (February 3, 1975)."

The Respondents also contend that Claimant was not engaged in maritime employment at the time of the accident. The work performed by Claimant is precisely the same work that was performed by the employee in the case of *Avvento v. Hellenic Lines, Ltd.*, 1 BRBS 174, BRB

74-153 (Nov. 12, 1974) in which the Benefits Review Board held that the claimant was an employee in maritime employment under the Act. In the *Avvento* case, as in the instant case, the Respondents argued that the goods had been removed from the unloading process when they came to rest on the pier for the temporary stowage after being removed from the ship and that Avvento could not be an "employee" because he was loading cargo onto a consignee's truck for further transshipment. However, the Board stated:

". . . To say that once the goods have come to rest on the pier after being removed from the ship that they are completely unloaded and no longer maritime in nature *is erroneous in light of the 1972 amendments to the Act.*

• • •

Thus it is clear that until cargo is delivered to a *trucker or other carrier* who is to pick it up for further transshipment, such cargo is in maritime commerce and *all employees engaged in its movement to that point are engaged in maritime employment.* (Emphasis supplied)

In light of the above facts and the Benefit Review Board decisions, it is clear that injury in question took place under the jurisdiction of the Act.

2. There is no constitutional limitation which would prohibit payment under the facts in this case.

An executive agency lacks jurisdiction to rule on the constitutionality of legislation, although it is often required to pass upon constitutional questions in deciding whether it has jurisdiction to apply a statute to a particular state of facts. *Engineers Public Service Co. v. Securities and*

Exchange Commission, 138 F. 2d 93 (D. C. Cir. 1943) dismissed as moot 332 U. S. 788; 3 *Davis, Administrative Law Treatise*, § 20.04.

In the case at hand Respondents contend that to interpret the 1972 Amendments to the Act so as to include Claimant would render the amendment unlawful. However, it has been held administratively that the extension of coverage under Section 3(a) to shoreside areas within State boundaries is not unconstitutional. *Coppolino v. International Terminal Operating Co., Inc.*, BRB 74-136 (Dec. 2, 1974); *Kelley v. Handcor, Inc.*, BRB 74-165 & 165A (Feb. 28, 1975): *Norat v. United Terminals, Inc.*, 75-LHCA-111 (Mar. 26, 1975).

Consequently, it is found that there is no constitutional impediment to the extension of coverage to disabilities resulting from an accidental injury incurred while loading a private truck at a terminal facility adjoining navigable waters of the United States, even though the cargo had been discharged from a ship several days earlier and had been held in the warehouse.

Accordingly, Claimant's injury is held compensable under the Act with interest due on the unpaid balance. Additionally there is due a reasonable attorney fee under Section 28 of the Act and fees for expert witness Joseph Antanasio and interpreter Alice Bello.

ORDER

1. It Is Hereby Ordered, that Maher Terminals, Inc. and the American Mutual Liability Insurance Company shall pay to the Claimant, Augustin Cabrera, compensation for temporary total disability for the period from April 3, 1973 to April 15, 1974 (54 weeks) at the rate of $164.24 per week, and compensation for permanent partial disability for the 42½ percent loss of use of his

right arm in the amount of $21,778.22, with six percent interest due from the date each payment becomes due until paid. Credit should be allowed for the $2,160.00 already paid a compensation under State Law.

2. It Is Further Ordered, that Maher Terminals, Inc. and the American Mutual Liability Insurance Company pay directly to Angelo C. Gucciardo, Esquire, the sum of $3,955.00 for legal services rendered on behalf of Claimant, which includes the amount of $75.00 to be paid by the attorney to expert witness Joseph Antanasio and the amount of $100.00 to be paid to Alice Bello for services as an interpreter at the hearings.

/s/ John W. Earman
John W. Earman
Administrative Law Judge

Dated: June 30, 1975
Washington, D. C.

U. S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D. C. 20210

BRB No. 75-200

AUGUSTIN CABRERA
Claimant-Respondent

v.

MAHER TERMINALS, INC.

and

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY
Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party in Interest

DECISION.

Appeal from Decision and Order of John W. Earman, Administrative Law Judge, United States Department of Labor.

Angelo C. Gucciardo (Irael, Adler, Ronca and Gucciardo), New York, New York, for the claimant.

Hugh J. Foley (Foley, Smit, Morabito and O'Boyle), New York, New York, for the employer/carrier.

Linda L. Carroll (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D. C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Hartman, Member:

This is an appeal from the Decision and Order (74-LHCA-262) of Administrative Law Judge John W. Earman pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 901 *et seq.* (hereinafter referred to as the Act).

The administrative law judge found that the claimant was injured on April 3, 1973, while working as "extra labor". While loading stripped cargo from a warehouse, located on the grounds of employer's terminal, into a consignee's truck, a box slipped and struck claimant injuring his upper right arm.

The employer/carrier paid compensation from April 4, 1973 to August 22, 1973, pursuant to the New Jersey statute.

The administrative law judge held that the claimant was engaged in employment covered by the Act and awarded compensation for temporary total disability from April 3, 1973 to April 15, 1974 and for 42.5% permanent partial disability to the right arm.

The employer/carrier have appealed, alleging that the claimant was neither a longshoreman nor engaged in maritime employment, that the injury did not occur on navigable waters as defined by the Act, and that inclusion of the claimant's injury within the coverage of the Act would be an unconstitutional invasion of the police power of New Jersey.

In order to find coverage under the Act, it must be established that the claimant was an employee under Section 2(3), that Maher Terminals was an employer under Section 2(4), and that the injury occurred on navigable waters as defined in Section 3(a).

Section 2(3) defines an employee as:

> [A]ny person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, . . . 33 U. S. C. § 902(3).

The record shows that the claimant was loading stripped goods into a consignee's truck. The Board has held that until cargo is delivered to a trucker or carrier who is to pick it up for further trans-shipment, such cargo is in maritime commerce and all employees engaged in its movement are engaged in maritime employment. *Avvento v. Hellenic Lines, Ltd.*, 1 BRBS 174, BRB No. 74-153 (Nov. 12, 1974); *Blundo v. International Terminal Operating Co.*, 2 BRBS 376, BRB No. 75-142 (Oct. 30, 1975). Therefore, the Board agrees with the administrative law judge's finding that the claimant is an employee within the meaning of the Act.

The Board has determined that its interpretation of the status requirement is in accord with the intent of the 1972 amendments to the Act, and will adhere to that interpretation although the Fourth Circuit Court of Appeals in *I. T. O. Corporation of Baltimore v. Adkins*, Nos. 75-1051, 75-1075, 75-1088, 75-1196 (4th Cir. Dec. 22, 1975), has taken a more restrictive view of those amendments. *Bradshaw v. J. A. McCarthy, Inc.*, BRBS , BRB No. 75-209 (Jan. 26, 1976).

There is no dispute that Maher Terminals, Inc., is an "employer" as defined in Section 2(4) of the Act. 33 U. S. C. § 902(4).

Employer/carrier also argue that the claimant was not injured on "navigable waters" as that term is defined in Section 3(a). Navigable waters include:

> [A]ny adjoining pier, wharf, dry dock, terminal . . . customarily used by an employer in loading, unloading, ... 33 U. S. C. § 903(a).

The administrative law judge found that the accident took place in a warehouse located 2,000 feet from the water. The warehouse was on the grounds of the employer's terminal which was enclosed on three sides, the fourth side adjoining the water. The warehouse was clearly used in the process of loading and unloading ships.

A terminal is one of the areas into which coverage of the Act was extended by the 1972 Amendments. *Caputo v. Northeast Marine Terminal, Inc.*, 3 BRBS 13, BRB No. 75-161 (Nov. 17, 1975). The word "terminal" has been held to include all the facilities within the terminal area. *Vinciquerra v. Transocean Gateway Corp.*, 1 BRBS 523, BRB No. 75-125 (June 5, 1975). A warehouse customarily used by an employer in loading or unloading a vessel is within the situs of coverage contemplated by Section 3(a) of the Act. *Kelley v. Handcor*, 1 BRBS 319, BRB No. 74-165 (Feb. 28, 1975); *Brown v. Maritime Terminals, Inc.*, 1 BRBS 212, BRB No. 74-177 (Dec. 6, 1974), *rev'd on other grounds*, No. 75-1075 (4th Cir. Dec. 22, 1975). Therefore, the administrative law judge's holding that the accident took place on navigable waters is in accordance with law.

The employer/carrier's argument that to find the injury within the jurisdiction of the Act would require an unlawful and unconstitutional invasion of the police power of New Jersey must be rejected. The Board's view on this subject has been adequately discussed in *Coppolino v. International Terminal Operating Co.*, 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974).

The claimant's attorney has requested approval of a fee for services rendered in successful defense of this appeal. Having submitted to the Board a statement of the extent and character of the necessary legal services rendered, in accordance with the applicable Rules and Regula-

tions, 20 C. F. R. §§ 702.132, 802.203, the claimant's attorney is awarded a fee of $650 to be paid directly by the employer in a lump sum. 33 U. S. C. § 928.

The Decision and Order of the administrative law judge, awarding compensatiaon to the claimant for temporary total and permanent partial disability, is affirmed.

Dated this 10th day
of March, 1976.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPEAL FROM THE BENEFITS REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR

Submitted Under Third Circuit Rule 12(6)
January 3, 1977

Before: ALDISERT and WEIS, *Circuit Judges*, and HUYETT, *District Judge.*°

JUDGMENT ORDER.

After consideration of all contentions raised by the petitioners for review, it is

ADJUDGED AND ORDERED that the petitions for review of the orders of the Benefits Review Board be and the same are hereby denied. *See Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*, 540 F. 2d 629 (3d Cir. 1976).

Costs taxed against petitioners.

By THE COURT,
ALDISERT
Circuit Judge

Attest:
THOMAS F. QUINN
Thomas F. Quinn, Clerk
DATED: Jan. 4, 1977
Certified as a true copy and issued in lieu
of a formal mandate on January 26, 1977.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

° Honorable Daniel H. Huyett, 3rd, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.